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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1001

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

THE POSTER EXCHANGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1970.

No.

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

THE POSTER EXCHANGE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, National Screen Service Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 24, 1970.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (A.19), not yet officially reported, is reported at TRADE REG. REP. ¶ 73,307. The opinion of the United States District Court for the Northern District of Georgia (A.1) is not reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered August 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether there is anything in the antitrust laws which requires petitioner—obligated under nonexclusive license agreements with a number of motion picture companies to produce and distribute advertising material used at theatres showing the licensors' pictures—to make such advertising materials available to a jobber who is unwilling to obtain license agreements under which he would assume responsibilities to the motion picture companies similar to petitioner's but who wishes to engage solely in the distribution to theatres of advertising materials produced by petitioner.

2. Whether, in a private antitrust action, an act of the defendant may be held to be in violation of Section 2 of the Sherman Act where the doing of that act by the defendant was contemplated and permitted under a prior consent judgment in a civil antitrust action by the United States involving the same subject matter as the private action.

3. Whether the district court's unexplained award of $450,000 in treble damages to respondent can be justified on the court of appeals' theory that petitioner and respondent were competitors in the distribution of advertising material to theatres and that it is permissible to treat respondent as damaged in the amount by which petitioner's net receipts (gross receipts less cost of inventory) in the relevant geographical area exceeded those of respondent during the period for which respondent claimed damages.

STATUTORY PROVISIONS INVOLVED.

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1964):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1964):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE.

This is an action by respondent for treble damages and injunctive relief for alleged violation of the antitrust laws, brought in the United States District Court for the Northern District of Georgia under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1964).

The Facts.

This case involves motion picture advertising accessories such as posters, used for display in and about theatre lobbies and designed to stimulate public attendance at the

exhibition of the particular motion picture for which they are created.[1]

The success of a motion picture is dependent in great measure on effective advertising. The motion picture companies (hereinafter called "Producers") spend large amounts of money for advertising, and they have a direct interest in the results of this advertising because motion pictures are at times licensed to theatres for a rental based on a percentage of the theatre's box office receipts. Standard accessories are among the numerous means employed in advertising, and the regular use by theatres of such accessories is essential to obtaining maximum revenue from the exhibition of motion pictures (270 F.2d at 149).

Standard accessories have been in use for many years. Historically, it was the general practice for the Producers to design and manufacture the various kinds of accessories and distribute them to theatres from the Producers' branch offices located throughout the United States. Standard accessories cannot be used for any motion picture other than the one for which they were created. And, since it is impossible accurately to predict the success of a motion picture and, therefore, the quantity of accessories that will be required in connection with the picture's exhibition, the manufacture and distribution of standard accessories involve an inherent obsolescence risk—*i.e.*, a risk that the quantity of accessories produced for a given picture will exceed the quantity eventually used, resulting in loss of the cost of producing the excess quantity (270 F.2d at 149).

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1. The facts stated under this heading are taken from the opinion in **Lawlor v. National Screen Service Corp.**, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960). As the court of appeals stated in its opinion in the case at bar (A.19), "The most complete history of this industry is . . . set out" in the **Lawlor** case.

Since motion pictures are exhibited in a number of theatres on successive runs, the same accessories may be reused by different theatres. This circumstance resulted in the appearance on the business scene of what came to be known as "poster renters," such as the respondent in this case. The poster renters were individuals who obtained standard accessories and rented and rerented them to theatres for successive runs. By 1940, there was at least one poster renter in business in nearly every motion picture exchange area in the United States (270 F.2d at 149).

Beginning in 1939 and continuing until 1947, one producer after another concluded that it would be preferable to delegate the tasks of creating and distributing standard accessories to an independent contractor possessing the experience, skill and facilities necessary successfully to undertake such tasks. The contractor chosen by each of the Producers was petitioner, National Screen Service Corporation (hereinafter "National Screen") (270 F.2d at 149-150, 151). (As we shall later discuss in greater detail, the courts of appeals for the Third and Fifth circuits have both held that there was no basis for contentions that these arrangements resulted from a conspiracy in violation of Section 1 of the Sherman Act.)

The first Producer to turn over its standard accessory business to National Screen required National Screen to maintain a local branch in each city where the Producer had a branch, to manufacture and distribute a full line—*i.e.*, each of the different kinds—of standard accessories for the Producer's pictures and to purchase the Producer's existing inventory of standard accessories. Since these obligations were to involve substantial expenditures, National Screen required that it be given the protection of an exclusive license to produce and distribute the Producer's standard accessories for a five-year term (270 F.2d at 150).

Similar considerations were involved in the other Producers' standard-accessory arrangements with National Screen (270 F.2d at 150, 151).

Each of the Producers which contracted for National Screen to produce and distribute standard accessories did so "for a good and sufficient economic reason, namely, to terminate an unprofitable feature of its business" (270 F.2d at 151). All of the Producers acted independently, as a result of substantial losses in their accessory businesses, in deciding to license an outsider to perform that phase of their businesses (270 F.2d at 150-151, 155). They contracted with National Screen because no comparable firm was available (270 F.2d at 155).

In 1943, in settlement of a private antitrust case, National Screen agreed to grant the poster-renter plaintiffs in that case sublicenses under which National Screen made available to them for distribution a full supply of whatever standard accessories National Screen manufactured under license from any Producer (270 F.2d at 151). In all, National Screen entered into sublicense agreements with twenty-four poster renters, including eleven who were not parties to the case (270 F.2d at 151).

The Government Case.

On April 28, 1952, the United States commenced an action against National Screen and the Producers, seeking injunctive relief against alleged violations of the antitrust laws in the manufacture and distribution of standard accessories and other advertising materials. **United States v. National Screen Service Corp. et al.**, Civil Action No. 75-138 (S.D.N.Y.)

The gist of the Government's complaint, insofar as it dealt with standard accessories, was that National Screen and the Producers were engaged in a conspiracy under

which the Producers would license only National Screen to make and distribute such accessories, in violation of Sections 1 and 2 of the Sherman Act (¶¶ 34, 35, 37). The complaint specifically referred to, and sought relief for, the poster renters [¶¶ 31, 32; Prayer ¶¶ 4(c), 7].

The Government case was terminated by consent judgments entered March 29, 1957. TRADE REG. REP. (1957 Trade Cas.) ¶ 68,670. The judgments provided that the court was entering them before trial and without determination of any issue and that there had been no admission by any party. Insofar as the judgments related to the poster renters, the judgments (1) enjoined National Screen from doing anything which might prevent any person's obtaining standard accessories from anyone other than National Screen or which might limit distribution to a defined geographic area [Section IV(E)] and (2) required the Producers, so long as they licensed anyone to produce and distribute standard accessories, to license all other applicants (Section V) but expressly permitted the Producers to require all licensees to produce a full line of accessories and to meet reasonable standards as to production and national distribution facilities to service all theatres with respect to the Producer's motion pictures [Section V(B)(1), (2)].

At the hearing before Judge Sugarman on entry of the judgments, counsel for the United States read into the record the following letter from the President of National Screen to the Assistant Attorney General in charge of the Antitrust Division:[2]

"Dear Judge Hansen:

"Re: United States v. National Screen, et al.

"In connection with the discussions leading up to the entry of the consent decree in the above case, we

2. Transcript of Hearing at 3-4, United States v. National Screen Service Corp., Civil Action No. 75-138 (S.D.N.Y. March 29, 1957).

wish to advise you that it is the intention of National Screen to continue serving poster renters for a period of one year from the date of entry of this decree.

"Very truly yours,

"Herman Robbins."

The *Lawlor* Case.

In 1949 (approximately three years before the commencement of the Government case), the poster renter in Philadelphia commenced an antitrust action against National Screen and the Producers in the Eastern District of Pennsylvania. The complaint alleged that the plaintiffs had been injured because they could no longer obtain standard accessories from the Producers and charged that National Screen's exclusive licenses from the Producers were the result of a conspiracy and amounted to monopolization.

After extensive pre-trial proceedings, including appeals, the details of which are irrelevant for present purposes, the case was tried in November and December 1957 and January 1958 before District Judge C. William Kraft, Jr., sitting without a jury. Following the trial, Judge Kraft held that the defendants had not violated the antitrust laws. The Court of Appeals for the Third Circuit (Goodrich, Kalodner and Staley, *C.JJ.*) unanimously affirmed, and this Court denied certiorari. **Lawlor v. National Screen Service Corp.**, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960).

In its opinion, the court of appeals discussed in detail the district court's extensive findings of fact and agreed with the district court that, on those facts, there was no conspiracy and no monopolization even though National Screen's licenses, at that time, were exclusive (270 F.2d at 152).

The court discussed additional factors precluding recovery: (1) plaintiffs had not attempted to obtain licenses

for themselves from any of the Producers (270 F.2d at 154); (2) since standard accessories created for one motion picture can be used only in connection with that picture, they are not competitive articles, and the mere increase in the number of licenses obtained by one individual accomplished neither a restraint of trade nor a limitation in the source of supply (*ibid.*); (3) plaintiffs, as mere jobbers of standard accessories, had no basis for a claim that they were entitled to a continuing supply of the accessories (270 F.2d at 154-155); and (4) plaintiffs had failed to show any conspiracy (270 F.2d at 155). The Producers, "acting independently . . . decided to license an outsider to perform [the standard accessory] phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task" (*ibid.*).

The *Vogelstein* Case.

One other decision in the poster-renter litigation is important for present purposes. In **Vogelstein v. National Screen Service Corp.**, 204 F. Supp. 591 (E.D. Pa. 1962) (Luongo, *D.J.*), reproduced in the appendix to this petition (A.32), the court dismissed a complaint by a Washington, D.C. poster renter which alleged the identical claim as the complaint in the **Lawlor** case, with one addition—*viz.*, an allegation that, since May 16, 1961, National Screen had discontinued making standard accessories available to Vogelstein (and all other poster renters), thereby compelling him to go out of business (A.44).

Judge Luongo held that this made no difference because the amended complaint did "not reveal any attempt by Vogelstein to secure a license for himself, nor any indication that such a license could not be obtained" (A.46), and, "The refusal to supply accessories to Vogelstein lacks significance absent a setting of conspiracy or monopoly"

(A.44). Further, he held, the fact that the consent judgments in **United States v. National Screen Service Corp.** provided for the grant of nonexclusive licenses by the Producers was a circumstance which "can only serve to weaken Vogelstein's claim" (A.43).

The Court of Appeals for the Third Circuit affirmed per curiam (A.47), 310 F.2d 738 (3d Cir. 1962), and this Court denied certiorari. 374 U.S. 840, *rehearing denied*, 375 U.S. 873 (1963).

The Case at Bar.

Respondent, a poster renter in Atlanta, Georgia (hereinafter called "Plaintiff"), filed this case on July 17, 1961, shortly after National Screen's publicly announced determination to discontinue supplying accessories to the poster renters.

Plaintiff's complaint followed the basic thrust of the **Lawlor** and **Vogelstein** complaints. As plaintiff's counsel said when the district judge asked him how this case differed from **Vogelstein**, in which he was also counsel [3]—

> ". . . All the cases throughout the country, the Smith case in Oklahoma, Lawlor in Philadelphia and Vogelstein in Washington, wherever you go, as I see it, they are the same with respect to proof of liability."

Plaintiff alleged that, from 1947 until May 16, 1961—about two months before the filing of the complaint—Plaintiff had purchased "substantial quantities" of accessories from National Screen for sale or lease to exhibitors in the Atlanta area (C.A. App. 6 [4]) and had been "successful in developing a substantial accessories rental business" in that

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3. Transcript of Hearing at 27 (Dec. 9, 1963).

4. References in this form are to the appendix in the court of appeals.

area, supplying fifteen to twenty per cent of the theatres (C.A. App. 8), that National Screen, as "part of a nation-wide program" affecting "not only plaintiff but similarly situated poster renters throughout the United States," had stopped supplying standard accessories to plaintiff on May 16, 1961 (C.A. App. 9) and had persisted in refusing to supply Plaintiff in spite of Plaintiff's requests "to be allowed to purchase motion picture accessories from National Screen as in the past" (C.A. App. 9-10), and that Plaintiff would be forced out of business if National Screen were not required to continue supplying accessories to Plaintiff (C.A. App. 12). The complaint sought preliminary and permanent injunctive relief and a money judgment in treble the amount of the claimed damage of $100,000 (C.A. App. 14).

National Screen answered, denying any violation of law and affirmatively asserting the availability, to Plaintiff, of licenses from the Producers, similar to National Screen's, as required by the consent judgments in **United States v. National Screen Service Corp.**

Brief reference to the extensive proceedings which occurred before the case went to trial is necessary.

District Judge Lewis R. Morgan, who handled the case throughout, granted a preliminary injunction enjoining National Screen, as requested by Plaintiff, "from directly or indirectly refusing to deal with the plaintiff upon the same terms and conditions which prevailed prior to February 15, 1961."[5] The court, at the same time, denied a motion by National Screen for summary judgment. The Court of Appeals for the Fifth Circuit affirmed.[6]

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5. **Poster Exchange, Inc. v. National Screen Service Corp.**, 198 F. Supp. 557, 562 (N.D. Ga. 1961).

6. **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F.2d 647 (5th Cir. 1962).

In 1963, Plaintiff amended its complaint by, among other things, adding five Producers as defendants. Judge Morgan granted the Producers' motion for summary judgment, holding that Plaintiff was relying on essentially the same charge which had been made in the **Lawlor** case and rejected by the Court of Appeals for the Third Circuit, as discussed above. He referred also to **Vogelstein** as "an action substantially similar to the case at bar," because that case, like this one, challenged National Screen's right to stop dealing with the poster-renters. He quoted with approval the statement by Judge Luongo, referring to **Lawlor**, that, "'The resolution of those issues [monopoly and conspiracy in **Lawlor**] depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either, the defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.'"[7] The court of appeals affirmed per curiam.[8]

Thereafter, Judge Morgan granted a renewed motion for summary judgment by National Screen, in an unreported opinion holding that the case against National Screen presented solely an issue of law which had been resolved in favor of National Screen by the decisions of the Court of Appeals for the Third Circuit in the **Vogelstein** and **Lawlor** cases (C.A. App. 233-234). The court of appeals reversed.[9]

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7. **Poster Exchange, Inc. v. National Screen Service Corp.**, 35 F.R.D. 558, 559-560 (N.D. Ga. 1963).

8. **Poster Exchange, Inc. v. Paramount Film Dist. Corp.**, 340 F.2d 320 (5th Cir.), *cert. denied*, 381 U.S. 936 (1965).

9. **Poster Exchange, Inc. v. National Screen Service Corp.**, 362 F.2d 571 (5th Cir.), *cert. denied*, 385 U.S. 948 (1966).

The net result of the pre-trial decisions in the case is that the court of appeals (1) deemed it irrelevant that, under the consent judgments in **United States v. National Screen Service Corp.**, Plaintiff could have sought licenses for itself from the Producers but decided not to do so,[10] (2) held that the material issue to be tried in the case was whether National Screen's refusal to deal with Plaintiff originated from the legitimate exercise of business judgment or was done with the intent or purpose of eliminating Plaintiff as a competitor[11] and (3) would not follow the Third Circuit's decision in **Vogelstein** because the district court's opinion in **Vogelstein** had failed to cite the cases relied on by Plaintiff and the court of appeals had not written an opinion.[12]

Following trial, Judge Morgan filed his decision in the case on February 17, 1969 (A.1).

Judge Morgan found that Plaintiff had been engaged as a poster renter in Atlanta, since about 1941, serving theatres in the Atlanta area, whereas National Screen manufactured standard accessories, and distributed them to theatres throughout the United States, for the motion pictures of the major Producers, which had ceased manufacturing and distributing their own accessories and had contracted for National Screen to do so exclusively (Findings 3, 6, 8, A.2, 4).[13] He made no finding—and there was no evidence—concerning the circumstances under which any of the ar-

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10. 305 F.2d at 652.

11. 305 F.2d at 654.

12. 362 F.2d at 573-574.

13. Since it is not feasible, within the limits of a petition for certiorari to show the basis for our disagreement with certain of the district court's findings, we present this petition on the basis of those findings but reserve the right, if this petition is granted, to urge the reasons why such findings are clearly erroneous.

rangements between National Screen and the Producers had been made.[14]

The court found that Plaintiff "by at least as early as 1947 was forced to, and did, obtain its requirements of standard motion picture accessories from National Screen" since the accessories were no longer available through the Producers' branch offices because of the exclusive arrangements then in effect between the Producers and National Screen (Finding 9, A.5). In another finding, the court noted that, prior to May 16, 1961, National Screen "sold to plaintiff substantial quantities of" standard accessories (Finding 13, A.6). The court found also that Plaintiff had been "successful in building up a substantial poster renter business at the expense of the 100 percent control which would otherwise be enjoyed by National Screen" (Finding 14, A.7).

Noting that National Screen "is and has been for many years the only concern in the continental United States with national distribution facilities for distributing standard motion picture accessories and the only concern which is now in fact receiving licenses from the major distributors of motion pictures to manufacture and distribute standard motion picture accessories with regard to films distributed by and through each of said major distributors," the court concluded that, "It is clear that National Screen has monopoly power and control both nationally and within the market area over the manufacturing and distribution of standard motion picture accessories with regard to films of the major distributors" (Finding 12, A.6).

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14. In the **Lawlor** case, the district court and the court of appeals considered such evidence and reached the conclusion that those arrangements were in all respects valid. See pp. 8-9 *supra*.

The court ignored the purging effect of the 1957 consent judgments in **United States v. National Screen Service Corp.** and ignored the undisputed fact that Plaintiff knew of the judgments and considered applying for licenses thereunder but nevertheless failed to do so (C.A. App. 827). The court's only reference to the consent judgments was in a finding reciting the provision in the judgments defining the standards which the Producers could require of an applicant for a license (Finding 15, A.7).

The court found that, after May 16, 1961, National Screen refused to sell standard accessories to Plaintiff "in spite of numerous requests by plaintiff that National Screen make available to it motion picture accessories ordered by it just as was done prior to the refusal to deal" (Finding 19, A.8). The court found that this refusal to deal had resulted in a decline of $400-$500 in Plaintiff's weekly business, that Plaintiff was unable to meet the demands of its exhibitor customers and that many of its former customers were dealing directly with National Screen as the only available source of supply (Finding 20, A.9).

On the issue of National Screen's intention when it determined to discontinue dealing with poster renters, Judge Morgan concluded that, "National Screen now cannot be heard to say that it did not intend to monopolize, but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase" (A.16).

While it was an undisputed fact that National Screen had purchased twenty-eight poster renters in 1940, there was no evidence of National Screen's reasons for these purchases or of the poster renters' reasons for selling to National

Screen, and the district court made no finding of fact relating to the circumstances under which these acquisitions had occurred.[15]

In view of Judge Morgan's conclusion that, "National Screen now cannot be heard" to explain its motives, he ignored uncontradicted evidence offered by National Screen showing that its standard accessory business had been incurring steadily-increasing substantial losses for several years prior to 1961 (D.Exh. 6; C.A. App. 802) and that this was the reason why National Screen had determined that it could no longer supply any of the poster renters (C.A. App. 1176-1179). Instead, he found that, "The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy" (Finding 24, A.10) and that, "The acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor" (Finding 25, A.11).

The court found that the period for which Plaintiff could recover damages from National Screen covered the four years (as prescribed by the statute of limitations[16])

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15. The district court in the **Lawlor** case found that the first Producer which engaged National Screen (in 1939) to manufacture and distribute standard accessories required National Screen "to open new exchanges throughout the country at its own expense and to employ the required sales staff in each exchange." This "required National Screen to assume leasehold and other obligations" (C.A. App. 72-73). Furthermore, that court rejected Finding 38 requested by the plaintiff, which read, "At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States." **Lawlor v. National Screen Service Corp.**, Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958).

16. Section 4B of the Clayton Act, 15 U.S.C. § 15b (1964).

immediately prior to the filing of the complaint (Finding 26, A.11). The court made no other findings as to damages.

In its conclusions of law, after holding that National Screen had "attempted to monopolize, and had actually monopolized, the business of distributing . . . standard accessories on a national scale, and particularly in the Atlanta exchange area," and that Plaintiff had been injured in its business or property by reason of that monopolization, the court concluded that Plaintiff had suffered damages in the amount of $150,000 and was entitled to recover thrice that amount, or $450,000, plus costs and fees (A.17), later awarded in the amount of $50,000 (C.A. App. 350).

The court ignored Plaintiff's claim for injunctive relief.

On appeal by National Screen, the Court of Appeals for the Fifth Circuit (Brown, *Ch.J.*, Ainsworth and Godbold, *C.J.J.*) affirmed (with a remand on the matter of counsel fees) (A.19).

The court of appeals rejected National Screen's position that the 1957 consent judgments, which required licenses for all on nondiscriminatory terms and contemplated that National Screen would discontinue supplying the poster renters after a year, should be given consideration in determining whether National Screen intended, or had the power, to monopolize when it discontinued supplying Plaintiff. The court characterized this as a position that the consent decree "had nationwide res judicata, collateral estoppel effect on persons who were not parties or involved" (A.25 n.11).

The court ignored the Third Circuit's holding in **Vogelstein** that National Screen did not violate the antitrust laws when it stopped dealing with the poster renters in 1961.

Faced with the district court's failure to explain the basis for its award of damages, the court of appeals adopted

a damage computation submitted by Plaintiff in a post-oral-argument brief in that court. Purporting to apply **Bigelow v. RKO Radio Pictures, Inc.**, 327 U.S. 251 (1946), the court noted that Plaintiff's net receipts (gross less cost of inventory) during the four years preceding the filing of the complaint amounted to $119,292, whereas National Screen's net receipts from distribution of standard accessories in the Atlanta area during the same period amounted to $436,745 —a difference of approximately $300,000. On this basis, the court said that, "Under the *Bigelow* formula, the District Court might have awarded a sum quite in excess of $150,000 in actual damages" (A.30).

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decision of the Court of Appeals for the Third Circuit in *Vogelstein*.

There is no dispute that the factual bases for the claim in the case at bar and the claim in **Vogelstein** are identical. The district court here expressly relied on **Vogelstein** as requiring summary judgment for National Screen in this case (see p. 12, *supra*), and the court of appeals expressly rejected **Vogelstein** in reversing that summary judgment (362 F.2d at 573-574; see pp. 12-13, *supra*).

The basic difference between the Third Circuit and the Fifth Circuit is that the Third Circuit saw the situation as it was: The sole effect of the standard accessory agreements between the Producers and National Screen was that each Producer, having made an agreement for someone else to assume responsibility for production and distribution of accessories for its pictures, no longer distributed such acces-

sories to theatres through its own branches and, therefore, no longer had any supply of accessories from which a poster renter could obtain whatever items he happened to want. That, of course, was simply the inevitable consequence of a legitimate business transaction on the part of each Producer and National Screen, and there is no basis for concluding that such a consequence renders the transaction violative of the antitrust laws. The poster renters do not assume any responsibilities for the manufacture of standard accessories or for the maintenance of inventories thereof—or, indeed, for distribution sufficient to meet any Producer's requirements.

The Fifth Circuit, on the other hand, premised its holding on the assumption that National Screen is a "monopoly." This assumption runs throughout all of that court's opinions in this case, although the court does not make clear whether it is basing its "monopoly" characterization on the fact that National Screen is the only company manufacturing each Producer's standard accessories or on the circumstance that all of the major Producers have given standard accessory licenses to National Screen.[17] Under neither theory, however, can there be a violation of Section 2 of the Sherman Act, for the offense there is not "monopoly" but "monopolization."[18]

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17. Applying the doctrine announced by Mr. Justice Holmes for this Court in **United States v. Winslow**, 227 U.S. 202 (1913), the court of appeals in the **Lawlor** case held that, since standard accessories for one motion picture can be used only in connection with that picture, they "are not competitive articles," and "therefore no mere increase in the number of licenses obtained by one individual accomplishes a restraint upon trade or limitation in the source of supply" (270 F.2d at 154).

18. *Cf.* Goodrich, *C.J.*, speaking for himself and Biggs and Maris, *C.JJ.*, constituting the three-judge district court in **United States v. Pullman Co.**, 64 F. Supp. 108, 112 (E.D. Pa. 1945), *aff'd by an equally divided Court*, 330 U.S. 806 (1947): "Here we must look rather closely at our concept of what constitutes an unlawful monopoly in this connection. The thing which got the Pullman Company into trouble was not that it was the only

There are no findings and no evidence on the issue of how National Screen became the licensee of all the Producers.[19] And, at least since entry of the consent judgment in **United States v. National Screen Service Corp.**, it is clear that National Screen has had no power to exclude anyone from obtaining licenses from the Producers.

The key question, then, is the legal effect of National Screen's refusal to supply the poster renters after May 16, 1961.[20]

The Third Circuit's view is that, "The refusal to supply accessories . . . lacks significance absent a setting of conspiracy or monopoly" (A.44). Accordingly, since National

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company furnishing sleeping car service [to the railroads], but that Pullman made it virtually impossible for anybody else to get into the business."

The classic statement of this principle is in Judge Learned Hand's opinion in **United States v. Aluminum Co. of America**, 148 F.2d 416, 429 (2d Cir. 1945): "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it."

This Court's most recent statement of the principle is in Mr. Justice Douglas's opinion in **United States v. Grinnell Corp.**, 384 U.S. 563, 570-571 (1966).

19. The Third Circuit pointed out, in **Lawlor**, that "no comparable firm was available to undertake the task" demanded by the Producers (270 F.2d at 155).

20. That the refusal to supply after May 16, 1961 was the gravamen of Plaintiff's complaint (C.A. App. 1) and amended complaint (C.A. App. 155) is clear. This was confirmed by Plaintiff's pre-trial statements of contentions and issues, submitted just before the trial (C.A. App. 242-253). Nevertheless, Plaintiff was permitted, over National Screen's objection, to inject into the trial issues relating to National Screen's furnishing of accessories to Plaintiff **before** May 16, 1961. The court of appeals (A.25) rejected National Screen's assertion of error in this respect, and we reserve the right to rely on this error if certiorari is granted. The existence of this issue is immaterial for present purposes, because it goes only to the question whether, if a refusal to deal violates the Sherman Act under the facts of this case, Plaintiff can show that the refusal occurred earlier than May 16, 1961.

Screen had not violated Section 2 of the Sherman Act in achieving its position, as the court had previously held in **Lawlor** and reaffirmed in **Vogelstein**, National Screen was free to refuse to deal with the poster renters. The Fifth Circuit's view is that, since the court regarded National Screen as a "monopoly," National Screen was not free to do so.[21]

This Court should resolve the conflict between the Third and Fifth circuits on this point. While we think it clear that the Third Circuit's view is the correct one, the existence of a contrary decision by another court of appeals inevitably creates doubts for both the antitrust bar and the business community. Stated in terms of this case, the conflict on the question whether the Sherman Act requires National Screen to supply anyone who wants to be a poster renter should be authoritatively and finally resolved by this Court so that National Screen will know either that its present course of conduct is lawful (as the Third Circuit has held and as its counsel have advised it in reliance on that holding) or that it must decide between abandoning the manufacture and distribution of standard accessories and making them available to poster renters (as the Fifth Circuit would require).

The importance of resolving this issue is underscored by the fact that the same issue is presented in other pending

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21. The infirmity in the Fifth Circuit's reasoning is pointed up by Chief Judge Brown's reliance (A.27) on this Court's decision in **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359 (1927). There, unlike the situation here, liability for the refusal to deal with the retail-distributor plaintiff rested on the fact, found in a prior Government suit, that Eastman Kodak had achieved its monopoly position by violation of the Sherman Act. Here, the Third Circuit found no monopolization in National Screen's position, and the consent judgment assured that its position in the future would be consonant with Section 2 of the Sherman Act.

cases. It is present in **Exhibitors Poster Exchange, Inc. v. National Screen Service Corp. et al.**, now pending before this Court (at No. 763) on petition by National Screen and the Producers for certiorari to review the decision of the Fifth Circuit reversing a summary judgment in favor of the defendants by the United States District Court for the Eastern District of Louisiana. It is present also in another suit by the Plaintiff in this case, commenced on February 26, 1969 in the Northern District of Georgia (Civil Action No. 12,497), seeking damages for the four-year period beginning February 26, 1965.[22] It is present also in **Houck Theatres, Inc. et al. v. National Screen Service Corp. et al.**, a suit by theatre owners, pending in the same court (Civil Action No. 12,607). And in his brief in opposition to certiorari in No. 763 (pp. 10, 12), respondent's counsel threatens even more such actions, a threat of some consequence in view of the mass of litigation which has already been brought, a "seemingly ceaseless saga," as the court of appeals put it (A.19).[23]

2. The Decision Below, in Denying Any Effect Whatever to the 1957 Consent Judgment, Creates an Uncertainty in the Enforcement of the Antitrust Laws Which Should Be Resolved by This Court.

The court of appeals' holding that National Screen violated Section 2 of the Sherman Act was premised on the court's assumption that National Screen had "monopoly power" because no other company could acquire a license from the Producers without establishing nationwide dis-

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22. That case is now pending before the Court of Appeals for the Fifth Circuit (No. 29,025) on an appeal by Plaintiff from the district court's grant of summary judgment in favor of the Producers.

23. All of the cases in the poster-renter litigation are cataloged in the petition for certiorari in No. 763 (pp. 8-9).

tribution facilities comparable to National Screen's (A.23). The court of appeals attributed National Screen's monopoly power to the fact that National Screen's license agreements were only "nominally nonexclusive" in that they "prohibited the producer from granting other licenses unless the prospective licensee agreed to establish a nationwide distribution system like that of National Screen" (A.23), and it held that this was so even after the 1957 consent judgments in **United States v. National Screen Service Corp.**

But the consent judgments expressly provide that, "The size of the organization and facilities of National Screen shall not be used as the standard for determining the adequacy of the applicant's qualifications" [Section V(B)(1)].

Furthermore, the judgments provide that the Producers must grant nonexclusive licenses to all applicants but **may** require the applicant to maintain "production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released . . ., all exhibitors desiring such service." There was no evidence and no finding that any Producer would in fact impose such requirements (except on National Screen). But, in any event, those requirements, according to both the court and the Department of Justice, were "reasonable business standards" [Section V(B)(1)], which the Producers could insist upon without perpetuating National Screen's alleged monopoly power which the court-imposed requirement of nondiscriminatory licenses-for-all was designed to end. If Plaintiff had to meet those standards to get a license, it was not because of any clauses in agreements between the Producers and National Screen but because the Department of Justice and the court in 1957 so stated in the judgments.

And because both the court and the Department of Justice thought that what they were doing—making li-

censes available to poster renters on "reasonable terms and conditions" [Section V(A)]—would not be an idle gesture but would prevent National Screen from having any monopoly power, they did not insist that National Screen continue indefinitely to supply the poster renters. Instead, they put into the record again, not as an exercise in futility but as both a protection for, and an admonition to, the poster renters—National Screen's commitment to continue serving them for one year. There was no doubt as to National Screen's rights thereafter, and both the court and the Department of Justice obviously felt that the exercise of such rights would not undo what the judgments had accomplished.

In short, National Screen's 1961 refusal-to-deal was permitted by the judgments and considered by the court and the Department of Justice to be in harmony with the antitrust laws.

If anyone should have second thoughts, whether the court or the Department of Justice, the judgments recited that the court retained jurisdiction to modify their provisions (Section VIII), a power the court would have had in any event. **United States v. Swift & Co.**, 286 U.S. 106 (1932); **System Federation No. 91 v. Wright**, 364 U.S. 642 (1961). And Plaintiff's counsel did, in fact, attempt to persuade the Department to seek modification of the judgments. See Petition for Rehearing, **Vogelstein v. National Screen Service Corp.**, 375 U.S. 873 (1963).

On the other hand, without citing any authority, the court of appeals treated the consent judgment as if it had never existed, had accomplished nothing and could be relied on by no one. Far from refusing to give it a "nationwide res judicata, collateral estoppel effect" (A.25 n.11), an ef-

fect which National Screen has never contended it had, the Fifth Circuit gave it no effect.

The question is not whether a judgment binds persons not parties thereto, or immunizes from private attack conduct which would otherwise violate the antitrust laws. The question is, rather, whether a judgment, designed to foster industrywide competition and which no one suggests has been violated, can be ignored in assessing the legal significance of action taken in reliance on the judgment and in complete compliance with the judgment. How could the courts below find that National Screen's 1961 refusal-to-deal was motivated by a "specific intent to monopolize" and "would result" in a "monopoly" (A.26 n.12) in the face of the fact that National Screen had been assured by the Government's judgment that a refusal to deal with the poster renters, after one year from entry of the judgment, would not constitute monopolization if the Producers and National Screen abided by the judgment? And how could the court of appeals characterize National Screen's post-judgment license agreements as exclusive in the face of the express terms of the judgment prohibiting exclusive agreements?

A consent judgment in a Government antitrust suit is entitled to more weight than an agreed judgment in a suit between private parties involving only private interests. It is a judgment fashioned by the Attorney General, who is "primarily charged by Congress with the duty of protecting the public interest under" the antitrust laws, **United States v. Borden Co.**, 347 U.S. 514, 518 (1954), and "it is a judicial act . . . and, therefore, involves a determination by the chancellor that it is equitable and in the public interest," **United States v. Radio Corp. of America**, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed on motion of appellant*, 318 U.S. 796 (1943). A consent judgment is always intended to establish a state of competition "in harmony with

law," **United States v. International Harvester Co.**, 274 U.S. 693, 702 (1927), and often to set guidelines for industrywide behavior.

These basic attributes have been recognized by this Court, which has sanctioned intervention by interested private parties in certain Government suits involving consent decrees. **Cascade Natural Gas Corp. v. El Paso Natural Gas Co.**, 386 U.S. 129 (1967); **Missouri-Kansas Pipe Line Co. v. United States**, 312 U.S. 502 (1941). The importance of the consent judgment procedure in Government enforcement of the antitrust laws has been emphasized by the Department of Justice in a recent statement to this Court.[24]

If the consent judgment is to continue to serve this useful purpose, the business community and the bar must not be left in doubt about the effect which a judgment will

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24. ". . . Resources simply are not available to investigate and prosecute to completion every possible antitrust violation. Terminating cases through consent decrees that provide effective relief enables the government to employ its limited personnel and facilities more effectively. In addition, where such a consent decree can be obtained, the government's prime objective—a change in the defendant's business practices—is accomplished and the public obtains the benefits thereof sooner than it would if the case were litigated. Finally, a consent judgment guarantees definite relief, as opposed to the uncertainty of outcome that exists whenever a case goes to trial.

"These benefits of consent decrees are not simply theoretical. During recent years, more than 70 percent of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent judgments. . . .

"In the present cases the consent judgments fully terminated all the defendants' alleged illegal business practices as demanded by the government, and provided adequate relief against their repetition. The district court permitted the appellants to present their objections to the decrees fully as *amici*. The settlement of these cases completely accomplished the government's objective in filing the suits, and did so without the uncertainty, delay and expense that would have resulted had the cases been tried. . . ." Government's Motion to Affirm at 11-12, 13-14, **City of New York v. United States**, 390 U.S. 715 (1968).

be given in subsequent private litigation and the extent to which it may be relied on as a guide to future conduct. Judge Barnes, a former Chief of the Antitrust Division, has recently adverted to this problem in an opinion for the Court of Appeals for the Ninth Circuit.[25]

In the case at bar, the courts below failed to recognize the problem and, unguided by any prior pronouncement of this Court, have decided the matter in a way that would deprive consent judgments of much of their usefulness and create further uncertainty in an area of the law vital to effective antitrust enforcement. Resolution by this Court is now essential, and we believe that the Court should decide the question by holding that action taken in reliance on a Government judgment should have at least presumptive validity.

3. The Court of Appeals' Attempt to Justify, by the *Bigelow* Formula, a $450,000 Treble Damage Award in the Face of Plaintiff's Own Evidence of Damages Amounting to $1,350 Should Be Reviewed by This Court.

The district court awarded $450,000 to Plaintiff without any explanation of how the court arrived at that figure (A.17). The court found only that National Screen stopped supplying Plaintiff on May 16, 1961 (Finding 20, A.9), that Plaintiff's gross business thereupon declined by $400-$500 weekly [Finding 20(a), A.9] and that Plaintiff was entitled to recover damages up to July 17, 1961 (Find-

25. "This litigation skirts a very perplexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws. . . ." **K-91, Inc. v. Gershwin Publishing Corp.**, 372 F.2d 1, 3 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

ing 26, A.11)—a period of about nine weeks. Plaintiff's testimony (C.A. App. 845) (there was no finding on the point) was that its net profits before taxes approximated ten per cent of gross. A loss of $500 in gross business for nine weeks, therefore, would mean a net loss of $450 in profits, which could justify a maximum award, after trebling, of $1,350.

In spite of these facts, the court of appeals sanctioned the district court's award of $450,000. In order to do this, the court of appeals had to hold that liability could be imposed for what had occurred before May 16, 1961 (A.25).[26] With respect to that period, the court said, "The District Court found that National Screen's pre-1961 acts of refusing to provide an adequate supply of accessories and charging 'top prices', as well as the 1961 complete refusal to deal, occurred and were motivated by the intention to drive [Plaintiff] out of the market" (A.24).

But the district court made no such finding. Even taking the district court's findings at full value,[27] the worst that they show on the subject of National Screen's pre-1961 dealings with Plaintiff is that National Screen sold accessories to Plaintiff, "determining at all times the quantity of said accessories available to [Plaintiff] and the prices to be charged therefor," and that Plaintiff had "always paid National Screen top prices" (Finding 23, A.10). Surely this does not amount to a finding that National Screen refused to provide an adequate supply of accessories, but that is the way the court of appeals seems to have read it. Nor is it a finding that Plaintiff suffered any damage whatever before May 16, 1961. There is no such finding.

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26. We pass the propriety of that holding for purposes of this petition. See note 20 *supra*.

27. Which we are not willing to do. See note 13 *supra*.

The court of appeals also stated that Plaintiff's business suffered a decline from 1957 to 1961: "In 1957 [Plaintiff] had 200-225 customers; in 1961 it had 15" (A.24). Here again, the court went far beyond the district court's finding, which was that Plaintiff "formerly had between 200 and 225 customers" and "had been reduced to approximately 15 customers" (Finding 25, A.11). The district court's finding did not specify **when** Plaintiff had 200-225 customers. Plaintiff's own testimony did: it was in May 1961 (C.A. App. 616, 620). Thus, the decline from the 200-225 level occurred **after** May 16, 1961 and not before. This is confirmed by Plaintiff's gross income figures, which remained relatively stable during the years 1957 to 1961 (P. Exh. 41; C.A. App. 626).

Thus, the court of appeals had no factual basis at all for sustaining any more than about $1,450 of the $450,000 award of damages.

In addition, the court of appeals seriously misapplied this Court's holding in **Bigelow v. RKO Radio Pictures, Inc.**, 327 U.S. 251 (1946). In **Bigelow**, the plaintiff's theatre had been excluded from playing pictures on a desirable run by the defendants' conspiracy. This Court held that, where "any more precise proof of the amount of damage" (327 U.S. at 266) is unavailable, damages can properly be measured by comparing the income earned by the plaintiff's theatre during the damage period with either (1) the income of the same theatre during an earlier period when that theatre had enjoyed the desirable run or (2) the income, during the damage period, of a theatre which had enjoyed the desirable run, where the plaintiff's theatre was at least comparable in size, location, equipment and attractiveness.

Both of those comparisons provided obviously rational yardsticks for determining the plaintiff's theatre's actual loss due to its exclusion from a desirable run during the

damage period. It is reasonable to assume that if a theatre is not excluded from a desirable run it will do as well as a comparable theatre which has the desirable run.

But neither of the two **Bigelow** yardsticks was appropriate in this case, for Plaintiff supplied precise evidence of its alleged loss of profits during the damage period.

Nevertheless, the second **Bigelow** yardstick, which the court of appeals seized on to justify the huge disparity between the actual loss of profit proved by Plaintiff—*i.e.*, $450 trebled to $1,350—and the huge award of $150,000 trebled to $450,000, rested on the proposition that Plaintiff's damages could be measured by National Screen's gross income in the area. This was a wholly inappropriate gauge in view of Plaintiff's specific evidence of its alleged loss of profits.

The yardsticks approved in **Bigelow** were acceptable to this Court as the only available, logical alternatives in the absence of more precise evidence. This Court did not approve those yardsticks as universal substitutes for more-direct proof.

Here there is not the slightest indication that the district court applied either of the **Bigelow** yardsticks in fixing the amount of its award at $150,000. Nevertheless, the court of appeals held that the **Bigelow** formula could have justified an even larger award merely because the difference between the gross receipts of the respective parties in the area was sufficient to permit a superficially plausible computation resulting in a figure in excess of the actual award.

Neither reason nor any possible legal principle can justify the district court's award, and the court of appeals' approval of that award should be reviewed and set aside by this Court.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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November 23, 1970.

Appendix.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 7665.

THE POSTER EXCHANGE, INC.,
Plaintiff

v.

NATIONAL SCREEN SERVICE CORPORATION,
Defendant.

(Filed February 17, 1969.)

OPINION; FINDINGS OF FACT AND CONCLUSIONS OF LAW.

MORGAN, *Circuit Judge.**

The plaintiff in the above-styled case, The Poster Exchange, Inc., filed in this Court on July 17, 1961, an action under the provisions of the Anti-Trust Laws of the United States, specifically under the Act of July 2, 1890 (15 U. S. C. Sec. 2), which act is commonly known as the Sherman Act. Jurisdiction of this Court in this case is predicated on Section 7 of the Sherman Act, and by Sections 4, 12 and 16 of

[* Judge Morgan became a member of the United States Court of Appeals for the Fifth Circuit on August 2, 1968.]

the Act of October 13, 1914 (15 U. S. C. 15, 22 and 16), specifically and commonly referred to as the Clayton Act.

The plaintiff herein is a Georgia corporation with offices and principal place of business in Atlanta. The defendant, National Screen Service Corporation, is a Delaware corporation. The defendant transacts and does business within the Northern District of Georgia, and has been engaged for many years in a business of distributing motion picture accessories. The plaintiff, since about 1941, has been engaged in the business of renting motion picture accessories.

The issues before the Court here are whether the evidence establishes a violation of the defendant of the Anti-Trust Laws, the establishment of a monopoly and refusal to deal with the plaintiff, such as would entitle the plaintiff to recover damages, and, if such has been established, the amount of damages which the plaintiff is entitled to recover.

Accordingly, after considering these issues and the evidence adduced upon the trial of this case, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

1.

Both parties are subject to the jurisdiction of this Court.

2.

This case is a treble damage anti-trust suit brought under the provisions of Section 4 of the Clayton Act (15 U. S. C. Section 15) for alleged violations of Section 2 of the Sherman Act (15 U. S. C. Section 2).

3.

The plaintiff, from its offices in Atlanta, services its exhibitor customers in all or part of the States of Georgia, Florida, Alabama and Tennessee, which is commonly referred to as the Atlanta Exchange Area. The defendant is

a national concern and services motion picture exhibitors throughout the entire United States, but maintains an office in Atlanta, from which it services the Atlanta Exchange Area.

4.

The defendant deals in three types of advertising accessories known in the trade as "standard accessories," "specialty accessories," and "trailers." At all times in question, the plaintiff has dealt only in "standard accessories" though it has sought to obtain "specialty accessories" from the defendant. The defendant has refused at all times to make these specialty accessories available to the plaintiff.

5.

The term "motion picture advertising accessories" is used in the motion picture industry to describe posters, signs, displays and similar material placed in and around the lobbies of motion picture theatres or on billboards outside the theatre to advertise the current or coming motion picture attractions in the particular theatre.

Certain types of motion picture advertising accessories traditionally have been known in the film industry as "standard accessories." The standard accessories involved in this case are:

(a) 8 × 10 inch "stills" (black and white photographs);

(b) 11 × 14 inch lobby displays;

(c) 22 × 28 inch lobby displays;

(d) 14 × 36 inch insert cards;

(e) one sheet;

(f) three sheets;

(g) six sheets;

(h) twenty-four sheets.

6.

At all times material hereto National Screen was engaged among other things in the business of creating, manufacturing and distributing standard motion picture accessories with regard to motion picture films distributed by or through the major American distributors of motion picture films, including such distributors as Paramount Film Distributing Corporation, Twentieth Century Fox Distributing Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, Loew's, Inc., and Columbia Pictures Corporation. Columbia Pictures Corporation now manufactures and distributes its own standard accessories on pictures distributed by or through it, but standard accessories on Columbia Pictures were formerly created, manufactured and distributed through National Screen.

7.

Standard accessories have been in use for many years. Historically the general practice in the industry was that the motion picture companies would design and manufacture the various types of standard accessories and distribute them through the company's branch offices or exchanges. Thus, at the commencement of its business in 1941, motion picture accessories were available to The Poster Exchange, Inc. through the Atlanta exchanges of major motion picture distributors and The Poster Exchange, Inc., dealt directly with the major producers of motion pictures, obtaining the posters and other accessories necessary for its business directly from them.

8.

By at least as early as 1947 all the above-named major distributors of motion picture films ceased manufacturing

or distributing motion picture accessories on films distributed by or through them and each of said distributors separately contracted with National Screen whereby National Screen was given exclusive rights upon a nation-wide basis to manufacture and distribute standard motion picture accessories with regard to motion picture films distributed by or through said major distributors.

9.

Because of the exclusive contracts entered into by each of the motion picture distributors with National Screen with the result that motion picture accessories were no longer available through the branch offices or exchanges of the film companies, the plaintiff by at least as early as 1947 was forced to, and did, obtain its requirements of standard motion picture accessories from National Screen.

10.

Plaintiff's exhibitor customers exhibit numerous films distributed by or through the major distributors and in connection with the exhibition of such films plaintiff's exhibitor customers require standard accessories manufactured and created for use in connection with the film being shown. No poster renter such as plaintiff can remain in business or meet the requirements of its exhibitor customers without ability to obtain standard motion picture accessories with regard to films distributed by or through the major distributors of motion picture films.

11.

Since at least as early as 1947 and continuing thereafter up through the filing of the complaint in this case, i.e, July 17, 1961, standard motion picture accessories on films distributed by all major distributors except Columbia have

been available only through National Screen. All standard accessories distributed in the local market with regard to films distributed by or through the major distributors are manufactured and distributed by National Screen. Prior to March 16, 1961, some such standard accessories were distributed by National Screen directly to exhibitors and some to the plaintiff, who in turn competed with National Screen in the distribution of such accessories to motion picture exhibitors.

12.

National Screen is and has been for many years the only concern in the continental United States with national distribution facilities for distributing standard motion picture accessories and the only concern which is now in fact receiving licenses from the major distributors of motion pictures to manufacture and distribute standard motion picture accessories with regard to films distributed by or through each of said major distributors. It is clear that National Screen has monopoly power and control both nationally and within the market area over the manufacturing and distribution of standard motion picture accessories with regard to films of the major distributors.

13.

Plaintiff prior to May 16, 1961, purchased standard motion picture accessories manufactured by National Screen, and National Screen sold to plaintiff substantial quantities of said accessories.

14.

Plaintiff competes with National Screen in the distribution of standard motion picture accessories to exhibitors in the market area and is the sole competitor of National Screen in the market area comprised of cities throughout

the states of Alabama, Georgia, Florida, and Tennessee. While National Screen controls the distribution of most standard motion picture accessories in the market area, plaintiff has been successful in building up a substantial poster renter business at the expense of the 100 per cent control which would otherwise be enjoyed by National Screen.

15.

Under a consent decree "in the case of United States v. National Screen Service Corporation, et al., a case in which the plaintiff was not a party" National Screen consented to a decree which among other provisions contained the following:

"V

"* * * (b) No producer Defendant shall be required to regard any person as a qualified applicant within the meaning of Subsection (a) of this section unless:

"(1) The applicant can meet and will agree to meet reasonable business standards as to reliability, financial responsibility, ability, production facilities and a national distribution organization and facilities to service, with respect to all feature motion pictures released by the Producer Defendant, all exhibitors desiring such service. Provided, however, that the size of the organization and facilities of National Screen shall not be used as the standards for determining the adequacy of the applicant's qualifications."

16.

National Screen's licenses from the major distributors have been nonexclusive since at least as early as 1957 and any qualified applicant as defined by said consent decree has been free to negotiate with the major distributors relative to

obtaining nonexclusive licenses to manufacture standard motion picture accessories. However, the distributors of motion picture films have traditionally insisted that licensees to manufacture its accessories have national distribution facilities, and since National Screen is the only concern meeting such requirement, National Screen is the only concern in fact licensed to manufacture and distribute standard accessories on films distributed by or through the major motion picture distributors.

17.

Plaintiff herein does not have nor has it ever had facilities or resources to manufacture or national distribution facilities with which to distribute standard motion picture accessories. Plaintiff has never been engaged in the business of manufacturing accessories.

18.

National Screen sold standard motion picture accessories manufactured by it to plaintiff for many years. However, on or about February 15, 1961, the Poster Exchange, Inc., was notified in writing by National Screen that from and after May 16, 1961, no further standard accessories manufactured by National Screen would be available to it for distribution in the market area or elsewhere.

19.

From and after May 16, 1961, National Screen has in fact refused to sell standard motion picture accessories to the plaintiff in spite of numerous requests by plaintiff that National Screen make available to it motion picture accessories ordered by it just as was done prior to the refusal to deal made effective on May 16, 1961.

20.

Since May 16, 1961, the Poster Exchange, Inc. has obtained no standard motion picture accessories from the branch office of National Screen in Atlanta, Georgia, nor directly from any other branch of National Screen. As a result of said refusal to sell by National Screen, the sole manufacturer and source of supply for standard motion picture accessories, plaintiff's business has been affected as follows:

(a) Sales and rentals of standard motion picture accessories to its exhibitor customers have declined from $400.00 to $500.00 per week since the refusal to deal by National Screen;

(b) No new business can be or is being solicited by The Poster Exchange, Inc., due to inability to obtain standard motion picture accessories from National Screen with resulting inability to meet the demands of exhibitor customers;

(c) The Poster Exchange, Inc., is unable to supply its regular exhibitor customers or any other exhibitor customers with their requirements of standard motion picture accessories. As a result, many of plaintiff's former customers are now dealing direct with National Screen as the only source of supply now available to them to meet their accessory needs. Continued inability of the plaintiff to obtain such accessories will likely mean that such customers are permanently lost.

21.

National Screen's refusal to sell standard motion picture accessories to the plaintiff will result and is resulting in the elimination of the plaintiff as a competitor with

National Screen in the distribution of standard motion picture accessories.

22.

The elimination of the plaintiff as a competitor of National Screen will give to National Screen complete control in the market area over the distribution of all standard motion picture accessories with regard to films distributed by or through the major distributors of motion pictures and all theatre owners in the market area exhibiting pictures distributed by or through the major distributors, except Columbia, will have to buy their requirement of such standard motion picture accessories from National Screen at such prices and on such terms and conditions as National Screen may establish.

23.

National Screen controls the distribution of all motion picture accessories of said major distributors in the market area. National Screen has at least since 1947 sold said accessories to The Poster Exchange, Inc., determining at all times the quantity of said accessories available to The Poster Exchange, Inc., and the prices to be charged therefor. The Poster Exchange, Inc., has always paid National Screen top prices for standard motion picture accessories which it purchased and has offered to continue to do so. It does not appear that plaintiff's business has been unprofitable to National Screen.

24.

The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy.

25.

The acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor in the Atlanta Exchange Area and was effective to the extent that plaintiff which formerly had between 200 and 225 customers and some 60% to 70% of the standard accessory business in the Atlanta Exchange Area has been reduced to approximately 15 customers whose needs it cannot now adequately service because of its inability to acquire standard motion picture accessories and plaintiff now has less than 2% of the total standard accessory market in the Atlanta Exchange Area.

26.

The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint. The complaint was filed July 17, 1961, thus the period involved is $^{198}/_{365}$ of the year 1957, all of the years 1958, 1959 and 1960, and $^{197}/_{365}$ of the year 1961.

DISCUSSION OF RELEVANT AUTHORITIES.

It appears to the Court that the case of *Eastman Kodak v. Southern Photo Materials Co.*, 273 U. S. 359, 71 L. Ed. 684, is pertinent to our factual situation here. Briefly summarized, the facts in the *Eastman Kodak* case were:

Eastman Kodak Company had a national monopoly of the market in photographic supplies, and for a few years before 1910 had sold supplies to Southern Photo Materials Company, which company operated a retail store in Atlanta. In 1910, Eastman Kodak opened its own retail store in Atlanta, and refused to sell any more supplies to Southern Photo except at the full retail price. Southern

Photo then filed an anti-trust suit against Eastman Kodak and won a jury verdict, upon which the District Court entered a judgment. Eastman Kodak appealed, but the judgment was affirmed by the Fifth Circuit Court of Appeals, and later was unanimously affirmed by the Supreme Court. The Supreme Court said in its opinion affirming the Fifth Circuit on page 375:

> "2. On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that such taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff. And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. 'Clearly,' as was

said by the court of appeals, 'it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' This question was submitted under proper instructions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact."

The fundamental purpose of the anti trust laws is to promote competition to the fullest extent reasonably possible. The Court of Appeals for the Seventh Circuit stated that "competition is the soul of the anti trust laws." *A. L. B. Theatres Corp. v. Loew's*, 355 F. 2d, 495. So, based on this theory and holding, it seems clear that the deliberate throttling of a competitor, having the effect of driving him out of business, violates the anti trust laws. However, even before a competitor is driven out of business, there is authority to the effect that the mere acquisition of power to eliminate a competitor, even though that power be unexercised, may constitute a violation of the anti trust laws. *American Tobacco Co. v. United States*, 328 U. S. 781, 808; *United States v. Griffith*, 334 U. S. 100, 106, 107. Mr. Justice Douglas stated in the last cited case:

"Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under Section 2 even though it remains unexercised. For Section 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control. See *United States v. Aluminum Co. of Amer-*

> *ica* (CCA 2d N. Y.) 148 F. 2d 416, 428, 429. Hence, the existence of power 'to exclude competition when it is desired to do so' is itself a violation of Section 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. United States*, 328 U. S. 781, 809, 811, 814, 90 L. Ed. 1575, 1593, 19594, 19596, 66 S. Ct. 1125. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' *International Salt Co. v. United States*, 332 U. S. 392, 396, ante, 20, 26, 68 S. Ct. 12. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America* (F) supra. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

Even though National Screen here contends that its course of conduct was motivated only by an intent to take advantage of a "legitimate exercise of business judgment," as distinguished from a specific intent to monopolize, it is the opinion of the Court that under the facts in this case, there is no basis for such contention. The question of a firm's specific intent to monopolize or not to monopolize cannot arise in a case where the defendant has actually achieved a complete monopoly. A distinction must be made between cases that involve only a charge of an attempt to monopolize, and in cases that involve actual completed monopolization. In the case of mere attempt to monopolize, a company can contend that it never had any specific intent to monopolize, but only an intent to exercise its best business judgment; but in a case of actual, completed monopolization, that company will be presumed to

have intended the natural consequences of its act. Judge Learned Hand stated in his opinion of the case of *Aluminum Company of America*, 148 F. 2d 416, at page 418:

> "In order to fall within Section 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

This language was quoted by the Supreme Court of the United States in the case of *American Tobacco Co. v. United States*, 328 U. S. 781.

The Supreme Court again stated in *United States v. Griffith*, 334 U. S. 100, 105:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequences of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U. S. 525, 543, 57 L. Ed. 333, 341, 33 S. Ct. 141, 44 LRA NS 325; *United States v. Masonite Corp.*, 316 U. S. 265, 275, 86 L. Ed. 1461, 1473, 62 S. Ct. 1070. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America*, (CCA 2d N. Y.) 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the Common Law used the term is necessary only where the facts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co. v. United States*, 196 U. S. 374, 396, 49 L. Ed. 518, 524, 25 S. Ct. 276:

> "'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'"

So, in view of the above-quoted language, it appears to this Court that National Screen now cannot be heard to say that it did not intend to monopolize, but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase.

Putting it another way, when a company has actually monopolized, there is no conceivable defense because monopolization is *absolutely condemned* by the Act. If this is true, then even though the defendant would lose money in the standard accessory phrase of its business as it contends that it would, the remedy would be to forego the business.

In view of the above discussion, the Court makes the following

Conclusions of Law.

1.

This Court has jurisdiction of the parties and the subject matter.

2.

The plaintiff and defendant are and have been engaged competitively in interstate commerce in the business of distributing motion picture advertising posters known as "standard accessories."

3.

Defendant has attempted to monopolize, and has actually monopolized, the business of distributing motion picture posters, known as standard accessories, on a national scale, and particularly in the Atlanta Exchange Area, which consists of all or part of the states of Georgia, Alabama, Florida and Tennessee, in violation of Section 2 of the Sherman Anti-Trust Act (15 U. S. C. Sec. 2).

4.

Plaintiff has been injured in its business and property by reason of defendant's monopolization of the business of distributing motion picture posters, known as standard accessories, on a national scale, and particularly in the Atlanta Exchange Area, which consists of all or parts of the states of Georgia, Alabama, Florida and Tennessee, in violation of Section 2 of the Sherman Anti-Trust Act (15 U. S. C. Sec. 2).

5.

The plaintiff has suffered damages in the amount of $150,000.00, and is entitled to recover from defendant treble that amount, or $450,000.00, in accordance with the provisions of Section 4 of the Clayton Act (15 U. S. C. Sec. 15).

6.

Judgment will be entered for the plaintiff, and against the defendant in the amount of $450,000.00, plus costs,

including reasonable attorney's fees, the amount of which is to be later determined.

It Is So Ordered.

This the 14th day of February, 1969.

/s/ Lewis R. Morgan
Lewis R. Morgan
United States Circuit Judge.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27,302.

THE FOSTER EXCHANGE, INC.,
Plaintiff-Appellee-Cross Appellant,

v.

NATIONAL SCREEN SERVICE CORPORATION,
Defendant-Appellant-Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(Filed August 24, 1970.)

Before BROWN, *Chief Judge*, AINSWORTH and GODBOLD, *Circuit Judges*.

BROWN, *Chief Judge*.

Here we write again in this seemingly ceaseless saga of antitrust litigation [1] between the local distributors of

1. This Court has recently written in the New Orleans phase of this litigation and there chronicled some of the history of the litigation and the industry involved. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 5 Cir., 1970, — F. 2d — [No. 26643, January 26, 1970]. The most complete history of this industry is, however, set out in *Lawlor v. National Screen Service Corp.*, 3d Cir., 1959, 270 F. 2d 146, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct.

motions picture advertising accessories[2] and the vertically integrated single producer and national distributor of the accessories, National Screen Service Corporation. This chapter, the Atlanta phase, has been elaborated by three previous opinions of this Court.[3]

The plot of this chapter revolves around monopoly — § 2 of the Sherman Act.[4] Poster claimed that National Screen

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1 (cont'd)
176, 4 L. Ed. 2d 742. See also *Landes v. National Screen Service Corp.*, 1958, 340 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122; *Vogelstein v. National Screen Service Corp.*, E. D. Pa., 1962, 204 F. Supp. 591; *Lipp v. National Screen Service Corp.*, E. D. Pa., 1960, 188 F. Supp. 245; *The Poster Exchange, Inc. v. National Screen Service Corp.*, N. D. Ga., 1963, 35 F. R. D. 588, aff'd, 5 Cir., 340 F. 2d 520; *National Screen Service Corp. v. The Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647.

2. "Standard accessories" consist principally of lithographed posters, large and small, and photographs of scenes from a motion picture, which along with window cards and other similar articles, are displayed in and about theatre lobbies and on billboards in order to stimulate public attendance at a current or future exhibition of a motion picture.

3. The previous appearances of this case in this Court were:

Poster I: *National Screen Service Corp. v. Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647, in which this Court in an opinion written by Judge Gewin affirmed the District Court's denial of National Screen's motion for summary judgment and Poster Exchanges motion for preliminary injunction and said there were issues of fact to be resolved;

Poster II: *Poster Exchange, Inc. v. Paramount Dist. Corp.*, 5 Cir., 1965, 340 F. 2d 320, in which this Court affirmed the District Court's summary judgment in favor of the film producing companies; and

Poster III: *Poster Exchange, Inc. v. National Screen Service Corp.*, 5 Cir., 1966, 362 F. 2d 571, in which this Court, in an opinion written by Judge Tuttle, reversed the District Court's summary judgment in favor of National Screen.

4. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. A. § 2.

used its position as the only producer and supplier of standard accessories for motion pictures to "monopolize" the Atlanta area market for the distribution of the accessories to movie exhibitors. Poster alleges two separate acts of monopolization. First, it claims that as far back as the statute of limitations can reach, here it is assumed that that is July, 1957, National Screen refused to provide Poster with an adequate supply of accessories, refused to grant Poster a sublicense, and priced the accessories that were provided at the same price that National Screen distributed material to the exhibitors—the "over-the-counter" price. The second claim was that in 1961 National Screen completely refused to continue supplying any accessories to Poster.

The case was tried without a jury and the District Court found that there had been monopolization and assessed damages of $150,000, tripled pursuant to 15 U. S. C. A. § 15[5] to $450,000. It also awarded attorney's fees of $50,000 to Poster Exchange. National Screen attacks the District Court's finding of liability, finding as to the amount of damages, and the amount of attorney fees awarded. Poster Exchange contends that the amount of attorney's fees awarded was inadequate. We, however, reject all of these contentions. But we remand for additional consideration of the amount of attorney's fees.

I.

The history of this industry-wide dispute has been set out several times by many Courts, including this one, and need not be restated here (See note 1, *supra*).

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5. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. A. § 15.

National Screen is the sole holder of a license to produce and distribute standard accessories for the large domestic movie producing companies.[6] It obtained this position after a substantial number of firms were already in the business of marketing the accessories to motion picture exhibitors. Poster is a local distributor-jobber in the Atlanta area.

Without specifics and details reflected in the numerous prior opinions, the claim made here took this shape. Prior to 1940 the major domestic motion picture producers produced and distributed standard accessories through local distributor-jobbers in major cities. Between 1940 and 1947 National Screen was licensed[7] by the producing companies to be the exclusive producer-distributor of standard accessories and to distribute them on a nationwide basis.

Armed with the exclusive licenses National Screen in 1943 bought out 28 of the local distributor-jobbers. In 1943 Philadelphia area jobber-distributors brought an antitrust action—the "Allied Suit". Shortly thereafter it was settled and National Screen agreed to sublicense the plaintiffs in that action, and did grant them and some others sublicenses. But even though Poster began making requests for such a

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6. The production companys for which National Screen produced and distributed accessories are Paramount Film Distributing Corporation, Warner Brothers Pictures Distributing Corporation, University Film Exchange, Inc., Columbia Pictures Corporation, United Artist Corporation, 20th Century Fox Film Corporation, as well as RKO and Loew's.

7. In 1940 National Screen obtained an exclusive license from Paramount and RKO. In 1942 such a license was obtained from Loew's, Inc. and the other big domestic producers were soon distributing standard accessories through National Screen:

Universal	August 1, 1944
Columbia	April 12, 1945
United Artists	January 21, 1946
Warner	March 22, 1946
Fox	July 1, 1947

sublicense as early as 1943 and made this request repeatedly, National Screen refused to grant it a sublicense. Meanwhile National Screen had entered the Atlanta Exchange Market. During this period National Screen did, however, supply Poster with accessories, but only in limited quantities, not enough for Poster to supply its customers. The prices charged were substantially higher than those paid by other sublicensees. In fact the prices were the same that National charged the other exhibitors—the over-the-counter prices.

About 1950, when the original exclusive licenses from the producers expired, National Screen entered into nominally nonexclusive agreements with all of the producers. These agreements, however, contained a type of "Most Favored Nation Clause" that prohibited the producer from granting other licenses unless the prospective licensee agreed to establish a nationwide distribution system like that of National Screen, and agreed to a full line production of accessories.

In 1954 the United States filed an antitrust action in the Southern District of New York (see note *infra*). And pursuant to a consent decree of 1957, National Screen considered itself obligated to continue to grant sublicenses.[8] The nominally nonexclusive provision of the license from the producers was also retained. Although during these years Poster had survived without a sublicense, its market share declined drastically. In about 1942-43 it had about 60% of the market in the Atlanta area, but by 1961 its share had declined to only 24%. In these years National Screen's share, which was zero when it started, rose to over 70%. In

8. The Consent Decree does not specify under what conditions National Screen was to deal with distributor-jobbers. But it is very clear that it considered itself obligated for a year—another unspecified limitation.

1961 National Screen leveled its final blow. It adopted a nationwide policy under which it refused to provide accessories to any distributor-jobber. Following this, Poster's share of the market fell to 2%. In 1957 it had 200-225 customers; in 1961 it had 15.[9] The District Court found that National Screen's pre-1961 acts of refusing to provide an adequate supply of accessories and charging "top prices", as well as the 1961 complete refusal to deal, occurred and were motivated by the intention to drive Poster out of the market.

II.

National Screen presents three challenges to the District Court's findings and conclusions. In the first, a double-feature National Screen argues that liability is prohibited by the 1957 consent decree entered in the Government anti-trust suit[10] and because *Lawlor v. National Screen Service Corp.*, 3 Cir., 1959, 270 F. 2d 746, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct. 676, 4 L. Ed. 2d 742 is controlling. These contentions have, however, been presented to this Court twice and have been rejected twice, first in Judge Gewin's 1962 opinion in Poster I and again in Judge Tuttle's opinion in

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9. Keeping the figure of the trade, Poster, in a verbal "trailer", has amply stated the essence of its two real claims:

> "It appears from the evidence that the defendant effectively stifled the plaintiff's business by degrees. First, entering exclusive contracts with the major producers, followed by refusal to grant a sub-license to the plaintiff to deal in standard accessories, followed by tactics making it difficult and impossible for the plaintiff to buy adequate supplies over-the-counter from the defendant, and finally, on May 16, 1961, by absolutely refusing to make any supplies whatever available to the plaintiff at any price, this being the final crowning blow."

Poster's Brief, p. 47.

10. The Consent Decree was entered in *United States v. National Screen Service Corp.* (civ. action 17-138, 1957 C. C. H. Trade Cases ¶ 68,670).

Poster III in 1966. (See note 3, *supra*). We reject them thrice.[11]

Second, National Screen contends that Poster in pretrial response to a discovery request and in its pleadings, there had been admissions that precluded imposing liability for pre-1961 acts. But we think it is plain that the District Court did not read these as reflecting a final, absolute judicial admission; nor do we. At most they related solely on the ultimate issues as just a few more pieces of evidentiary footage, which the District Court could, but was not required to credit. As a last reel, the whole trial would have been a waste. That De Mille epic would not have been carried out if anyone, including the Judge, believed that Poster Exchange after years of protest were now telling the Judge that until 1961 everything was rosy.

National Screen's third contention, which is closely related to the second, is that the District Court's fact findings upon which the conclusion of Sherman Act liability is based are not supported. But this challenge begins with the heavy burden of F. R. Civ. P. 52(a)'s clearly erroneous standard. *Lawlor v. National Screen Service Corp.*, 3 Cir. 1959, 270 F. 2d 146, 152, *cert. denied*, 1960, 362 U. S. 922, 80 S. Ct. 676, 4 L. Ed. 2d 742. This greatly simplifies our quest. There is direct testimony of present and former employees of Poster Exchange as well as testimony of former National Screen employees that prior to 1961 National Screen had restricted the number of accessories available to Poster and priced the accessories that were supplied at a "top price". The testi-

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11. As to the 1957 decree we do not believe that either *United States v. Borden Co.*, 1954, 347 U. S. 514, 74 S. Ct. 703, 98 L. Ed. 903; *Sam Fox Publishing Co., Inc. v. United States*, 1961, 366 U. S. 683, 81 S. Ct. 1309, 6 L. Ed. 2d 604; *K-91 Inc. v. Gershwin Publishing Corp.*, 9 Cir., 1967, 372 F. 2d 1, *cert. denied*, 1968, 389 U. S. 1045, 88 S. Ct. 761, 19 L. Ed. 2d 838; or other cases referred to by National Screen support the position that this consent decree had nationwide res judicata, collateral estoppel effect on persons who were not parties or involved.

many also showed that this, as well as the 1961 complete refusal to deal, was done with the intention of driving Poster out of the market.[12] On this approach we think that there was quite enough to warrant the District Court's fact finding.

These three challenges are really previews. The main feature here is National Screen's argument that even on the facts found there can be no § 2 liability. The review of that argument starts with the central element of the plot—National Screen was the only producer of standard accessories. During the period for which liability is asserted, National Screen's licenses from the producers were only nominally nonexclusive.[13] National Screen certainly had, as the District Court found, monopoly power within all conceivable market conditions. In order for another company to have acquired a license it would have had to make a multimillion dollar investment. The producing companies required under their "Most Favored Nation" clauses required nationwide distribution facilities, full line producing and

12. There is no doubt that the general rule requires a finding of specific intent to monopolize. *See Schine Chain Theatres v. United States*, 1948, 334 U. S. 110, 68 S. Ct. 947, 92 L. Ed. 1245; *National Screen Service Corp. v. Poster Exchange, Inc.*, 5 Cir. 1962, 305 F. 2d 647. And we have such a finding here. But we also have a finding that a monopoly would result from National Screen's conduct. As the Court said in *United States v. Griffith*, 1948, 334 U. S. 100, 105, 68 S. Ct. 941, —, 92 L. Ed. 1236, 1242, it is "not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws had been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement."

13. National Screen acquired its position as the sole producer of standard accessories for motion pictures produced by the major domestic producers in the 1940s under exclusive contracts. We do not pass on the legality of those exclusive dealing contracts. *See Lawlor, supra.* It is enough here that National Screen had monopoly power at the manufacturing level and used it to prevent competition at the distributor-jobber level. As the Court said in *United States v. Griffith*, 1948, 334 U. S. 100, 107, 68 S. Ct. 941, —, 92 L. Ed. 1236, 1243, it "follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

direct competition with National Screen's already established organization. Moreover, Poster was only a local distributor-jobber. And the District Court was entitled to conclude that Poster cannot be required to convert the nature of its business, make a multimillion dollar investment and become a nationwide distributor just to survive in the Atlanta area. *See United States v. Aluminum Company of America, Inc.*, 2 Cir. 1945, 148 F. 2d 416.

The District Court's fact finding, which comes under Rule 52(a)'s clearly erroneous umbrella, was that National Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level. Such conduct has long been held to violate § 2. This is just the type of evil that the prohibitions on tying and other such per se violations are aimed at. As Mr. Justice Clark said in *Times-Picayune Pub. Co. v. United States*, 1953, 345 U. S. 594, 611, 73 S. Ct. 872, —, 97 L. Ed. 1277, 1291; "the essence of illegality . . . is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."

Moreover, the Supreme Court has long ago condemned a vertically integrated manufacturer-retailer from using its power at one level to drive out competition at another. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 1927, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684, a retail distributor of photographic equipment brought a private antitrust action seeking recovery under § 2. The jury found that Eastman had refused to continue selling photographic equipment to plaintiff at a wholesale price and that Eastman's activities were motivated by a desire to eliminate plaintiff as a competitor in the Atlanta retail market. The Supreme Court held that there had been a § 2 violation.

National Screen was found to have engaged in the same kind of intentional monopolistic conduct. And this conduct cannot be defended on the ground that it was only the exercise of legitimate business judgment. National Screen did introduce an accounting analysis that indicated that in the years preceding [14] 1961 it did sustain nationwide losses in its Standard Assessory Division.[15]

But National Screen for its own inarticulated reasons stayed in the business,[16] either as a loss leader, feeder, or for whatever reason. And the District Court was entitled to infer that National Screen's decision to stay in the standard accessory business even in the face of losses indicated that its decision to stop dealing with distributor-jobbers was not "dictated by sound business policy." And there was no evidence that dealing through distributor-jobbers was more expensive than dealing directly with the exhibitors. Nor was there any indication that efficiency could be improved by dealing directly. *Times-Picayune, supra.*

There can be no doubt that becoming a complete monopoly may improve a business' financial condition. But becoming a monopoly simply to make more money is

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14. 1959 $161,200
1960 $184,058
1961 $244,900

15. There was evidence that indicated that in some licenses from some producers there were percentage-of-profits provisions under which National Screen did, however, continue to make payments to producers from its Atlanta operation. We do not, however, consider these payments the basis for the District Court's finding nor of central importance here.

16. After the 1961 decision to stop dealing with distributor-jobbers became effective, losses as computed by the accounting firm relied on by National Screen went up.

1962 $381,056
1963 $415,933
1964 $523,511

not a "legitimate business justification" for "monopolizing."

III.

National Screen's objection to the amount of damages assessed also must overcome the high hurdle of the Rule 52(a) clearly erroneous standard. And here that standard is raised even higher by the well established rule that although the fact of injury must be certainly proved, the amount of loss, because of its very nature, can be estimated on any reasonable basis. *Eastman Kodak Co. v. Southern Photo Materials, supra; Bigelow v. RKO Radio Pictures, Inc.*, 1945, 327 U. S. 251, 66 S. Ct. 144, 90 L. Ed. 652; *Store Parchment Co. v. Paterson Parchment Paper Co.*, 1931, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544.

National Screen's basic argument about the amount of damages is that Poster was entitled to recover damages only from the time of the complete refusal to deal in 1961.[17] In final analysis, however, this contention rests on the argument that Poster had by pre-trial admissions abandoned its theory of liability for the pre-1961 acts and on the argument that the District Court's findings of fact regarding this period are not supported by the record. We have of course rejected both of these contentions. Thus on the findings we have credited that Poster was entitled to recover damages for that wrong as well as for injury resulting from National Screen's complete refusal to deal in 1961.

Our assaying the reasonableness of the $150,000 in damages found by the District Court can be based on the formula—a comparison of the net receipts of the parties—Mr. Justice Stone set out in *Bigelow, supra.* For there is no doubt that there was ample basis for using that formula

17. Damages were claimed up to the time this suit was filed in the summer of 1961.

here.[18] And it is clear that use of the *Bigelow* formula is not precluded by *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 5 Cir., 1967, 383 F. 2d 97, *cert. denied*, 1968, 390 U. S. 904, 88 S. Ct. 816, 19 L. Ed. 2d 870, referring to it. Under the *Bigelow* formula the District Court might have awarded a sum quite in excess of $150,000 in actual damages.[19]

In view of the grossly predatory practices engaged in by National Screen and the fact that Poster's once substantial business had been almost destroyed, certainly the $150,000 awarded was not excessive.

IV.

Both National Screen and Poster Exchange are dissatisfied with the amount of attorney's fees awarded. National Screen claims the $50,000 awarded is grossly excessive while Poster claims it is completely inadequate and requests that the award be increased by $100,000. At the outset we think the services were worth at least $50,000 for work done at the District Court level and we affirm the District Court's award as a floor. See *Grigsby v. Coastal Marine Service*, 5 Cir., 1969, 412 F. 2d 1011, 1042. We

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18. There is no surmise or conjecture about the applicability of *Bigelow*. There was an established business with a substantial part of the market and that business was a profitable operation. That operation, however, became less and less profitable while National Screen, which started from nothing, captured most of the market by predatory practices. And there can be no doubt that National Screen and Poster had similar relations with exhibitors and were certainly handling fungible goods.

19.

	Poster Exchange	*National Screen*
Gross Receipts	$264,297	*$929,245
Cost of inventory	$145,005	$492,500
Net receipts	$119,292	$436,745

* Atlanta Exchange area only.

believe that this matter should be remanded for consideration of factors, which we apprehend were perhaps not given appropriate consideration or weight by the District Court.[20] The District Court should consider the time, difficulty, and perseverance required to succeed against such formidable, resourceful opposition to determine whether the $50,000 award should be increased. Independently of the fee fixed for work at the District Court level, the Judge should also fix the fee for all of the appellate work including that done on the instant appeal. He should take into account all of the factors including those briefly summarized here. Although National Screen contends the case is simple, it required 111 pages for its pre-argument briefs and it has also filled a post-argument brief. Counsel for Poster was required to respond at length and here it might be appropriate to repeat, moreover, that this is the fourth time this case has been in this Court. We feel that this is the time to compensate the attorneys for the tenacity displayed in this litigation.

AFFIRMED IN PART AND REMANDED IN PART.

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20. We do not put this in terms of abuse of discretion. Abuse of discretion is undoubtedly the proper standard for review, not artificial percentage of the single damages. See *W. W. Montague & Co. v. Lowry*, 1904, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608; *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 6 Cir., 1965, 346 F. 2d 661, *cert. denied*, 382 U. S. 904, 86 S. Ct. 239, 15 L. Ed. 2d 157.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 29526

HARRY VOGELSTEIN,
TRADING AS BALTIMORE POSTER COMPANY,
Plaintiff

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.,
Defendants.

(Filed March 30, 1962.)

LUONGO, *District Judge.*

In this antitrust action, defendants' motion to dismiss the complaint has presented the Court with the following issue:

Does a stipulation entered into by the parties on November 4, 1957 during the course of a prior suit[1] and the dismissal of that action in accordance with the terms of the stipulation compel us likewise to dismiss the instant complaint?

The details of the history of the litigation are essential to the resolution of the issue. The matter really has a prehistory. In 1942 various poster leasing dealers instituted a treble damage antitrust action against National Screen

1. *Harry Vogelstein, trading as Baltimore Poster Company v. National Screen Service Corporation*, Civil Action No. 11678.

Service Corporation (hereinafter referred to as National Screen) and others. *Allied Poster & Supply Corporation v. National Screen Service Corporation*, Civil Action No. 2472. The complaint alleged that exclusive license agreements whereby motion picture producers authorized National Screen to manufacture and distribute motion picture advertising accessories, constituted a violation of the antitrust laws. That action was settled and dismissed with prejudice. One of the terms of the settlement agreement required National Screen to make available, by sublicense, certain material to the dealers who were plaintiffs in that action.

On December 5, 1950, while the sublicense agreements were in effect, Vogelstein, who was not a party to the Allied suit but who was permitted to purchase materials from National Screen, filed a complaint (hereinafter referred to as "*Vogelstein #1*") in this Court (Civil Action No. 11678) against the same defendants who are named as party defendants in the matter now before us. "*Vogelstein #1*" alleged that defendants "* * * had conspired to monopolize, and had actually monopolized the business of distributing motion picture advertising posters throughout the United States in violation of Sections 1 and 2 of the Sherman Anti-trust Act [15 U. S. C. A. §§ 1, 2]." That suit was one of seven similar suits in which various poster dealers sued the same defendants stating their claims in substantially the same terms and basing their actions on identical theories of the case.

Like the *Allied* case the allegations of unlawful monopoly and conspiracy in these seven suits were predicated on the exclusive licenses to produce and distribute advertising accessories which various motion picture producers had granted to National Screen. The period for which damages were sought and the period during which the alleged unlawful monopoly and conspiracy came into existence and flourished was 1943-1949. The events alleged to have occurred

during those years, as we shall demonstrate later in this opinion, are crucial in resolving the issue in the instant case.

Of the seven cases, *Lawlor v. National Screen Service Corporation*, Civil Action No. 10020 (hereinafter referred to as "Lawlor") had been docketed earliest.[2] At pre-trial conferences held in October and November 1957, Judge Kraft, to whom the *Lawlor* case had been assigned, aware of the six companion cases, "* * * suggested that the parties endeavor to reach some agreement which would obviate the necessity to retry in any of the companion cases certain of the issues to be litigated in the Lawlor case". *Lipp v. National Screen Service Corporation*, 188 F. Supp. 245, 246 (D. C. E. D. Pa. 1960).

On November 4, 1957, those discussions resulted in an agreement between the parties which provided in part:

> "In the remaining six cases if, by final judgment in whatever shall have been the court of last resort, it is determined in Civil Action No. 10020 that no conspiracy or unlawful monopoly existed, that finding shall be determinative of that issue in the remaining six cases. On the contrary, if such final determination therein shall be that the unlawful conspiracy or monopoly did exist, then the remaining six cases shall be consolidated for trial and tried without a jury."

During the conference at which the above agreement was recorded, attention was called to another case, Civil Action No. 22707 (hereinafter referred to as "*Vogelstein #2*"), in which parties plaintiff to the seven suits then pending joined in one complaint containing seven counts, one for each plaintiff, alleging the same cause of action as was contained in the pending suits, but seeking damages for the

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2. The *Lawlor* case has had an extensive history in the Courts. A summary of this history is found in *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, 147-148 (3rd Cir. 1959).

period subsequent to the commencement of those original suits. "*Vogelstein #2*", the supplemental action, was not included in the stipulation.

Lawlor was tried in November-December 1957, and January 1958, and resulted in judgment for defendants. One hundred forty findings of fact and twelve conclusions of law were issued by the Court, including the following two conclusions of law:

> "3. The defendant, National Screen, did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act."
>
> "4. No defendant herein combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."

Judgment was affirmed on appeal, 270 F. 2d 146 (3rd Cir. 1959) and plaintiffs' petition for certiorari was denied by the Supreme Court, 362 U. S. 922 (1960).

At this point we must reemphasize that in *Lawlor*, in "*Vogelstein #1*", and in the other five cases as well, the acts alleged to be the basis of unlawful monopoly and conspiracy occurred during the period "from August 19, 1943 to August 18, 1949, inclusive". Judge Kraft, in *Lawlor*, found that that conduct did not constitute an unlawful conspiracy and monopoly.

Defendants thereupon moved for summary judgment not only in the six companion cases (including "*Vogelstein #1*"), but in the supplemental action (including "*Vogelstein #2*") as well. Dissatisfied with the *Lawlor* decision, plaintiffs in the companion cases tested the effect of the stipulation by opposing those motions. In *Lipp v. National Screen Service Corporation, supra*, 188 F. Supp. at pages 247-248, Judge Kraft entered judgments in favor of defendants, and discussed the valid and binding effect of the stipulation in the following terms:

"Since the issues of liability were determined adversely to the plaintiffs in *Lawlor*, the clear and unequivocal terms of the pre-trial agreement require judgments for the defendants in the six companion cases, which were expressly made the subject of the agreement. Plaintiffs' contentions to the contrary are wholly devoid of merit.

"Plaintiffs assert that they have not 'had their day in court.' They urge the fact that at the *Lawlor* trial, on objection, we excluded certain evidence inadmissible in the *Lawlor* trial which might have been admissible in the trial of one of the six companion cases. Our ruling was clearly correct for the reason, as we then stated, that 'the stipulation did not embrace any agreement that evidence which was admissible in one case not on trial should be admissible in the case now on trial though otherwise inadmissible therein.'

"Plaintiffs further contend that the judgment of dismissal in *Lawlor* 'was based, in large part, on dozens of the court's findings of fact peculiar to the plaintiffs in that case, and, therefore, totally inapplicable to any of the cases involved in these proceedings.' Even if such be the fact, it affords no sufficient reason to nullify a stipulation clear and unequivocal in its terms, free of any limitation or qualification and entered into only after the most thoughtful and prolonged consideration and discussion among counsel. The actions had then been pending for some seven years and *Lawlor* had already had, before trial, a noteworthy appellate history. Presumably, all of the mature, experienced and able counsel were quite aware of the existing factual circumstances in each of the cases and none would have hesitated to insist upon appropriate reservations,

conditions or qualifications, to the stipulation, had a substantial difference in facts in any case so required."

The Court also entered judgment for defendants in the supplemental actions. At the time the stipulation was recorded the parties' attention was called to the fact that it did not expressly include the supplemental action. This matter was discussed and counsel for plaintiff summed up the thinking of all counsel when he said:

> "* * * as a practical matter, that suit [*"Vogelstein #2"*] being merely supplemental to this suit, as Mr. Mullinix says, and Mr. Ward, it simply carries on, it simply brings the other case down to date. And, certainly, if, as we have assumed, for instance, that the Court finds that there is no liability here, no violation of the Sherman Act, the second suit will certainly be dead when its parent dies." *Lipp v. National Screen Service Corporation, supra,* at p. 247.

That being the understanding by counsel of the scope and effect of the stipulation, the course to be followed by the Court was clear.

On appeal, the Court of Appeals affirmed the decision of the District Court, 290 F. 2d 321 (3rd Cir. 1961) and at page 322 stated:

> "The agreement made among counsel was no compromise of a lawsuit. It was, instead, a common sense way of handling several cases involving the same points. The judge could have ordered a consolidated trial for all of them. * * * It was considered more feasible to handle the litigation in the manner stipulated for. Defendants took their chances on judgments against them in seven cases if the *Lawlor* case was won. Plaintiffs took their chances on losing if the *Lawlor* case was lost. * * *"

We finally turn to the complaint before us, that filed in April, 1961 (hereinafter called "*Vogelstein #3*" or "present complaint"). The complainant, Vogelstein, is engaged in the business of supplying motion picture theatres with advertising materials, such as posters, etc. Defendant, National Screen Service Corporation, manufactures and supplies advertising paraphernalia to theatre operators throughout the United States and the remaining defendants are the principal producers and distributors of motion picture films in the United States. The complaint is so short and its wording so critical to the issue, that we have reproduced the following averments:

> "1. On December 5, 1950, the plaintiff herein filed a complaint in the said court which was docketed as Civil Action No. 11,678 of 1950.
>
> "2. In said complaint plaintiff alleged, in substance and effect, that the defendants therein, who were the same as the above named defendants in the instant action, had conspired to monopolize, and had actually monopolized, the business of distributing motion picture advertising posters throughout the United States in violation of sections 1 and 2 of the Sherman Anti-Trust Act.
>
> "3. On June 3, 1957, plaintiff, among others, commenced a second action in the same court, against the same defendants, alleging in substance and effect, that all defendants had continued and were still continuing, the illegal acts and practices complained of in said Civil Action No. 11,678 of 1950, and praying inter alia, for treble the damages suffered since December 5, 1950. Said second action was docketed in said court as Civil Action No. 22,707 of 1957.

"4. All of the defendants have continued and are still continuing to monopolize the business of distributing motion picture advertising posters as alleged in the complaints filed in Civil Action No. 11,678 of 1950, and No. 22,707 of 1957."

Plaintiff, in "*Vogelstein #3*", prays for damages from the time of the filing of "*Vogelstein #2*", June 31, 1957 to the date of the filing of "*Vogelstein #3*". On January 11, 1962, an amendment to "*Vogelstein #3*" was filed containing one allegation, the nature and effect of which will be considered later. Defendants have moved to dismiss "*Vogelstein #3*" and the amendment thereto.

Courts are cautious in dealing with motions to dismiss, particularly where to grant the motion would terminate the litigation before the parties have had their day in court. We are aware that the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962) has cautioned us that "* * * summary procedures should be used sparingly in complex antitrust litigation * * *." With this in mind, we approach the motion before us even more warily since the basis for the motion is a stipulation and the subsequent entry of summary judgment pursuant to that stipulation. Nevertheless, after consideration of all the pleadings previously referred to, the motions to dismiss will be granted.

The allegations in the present complaint constitute a reiteration, by incorporation by reference, of the allegations contained in "*Vogelstein #1*". Nothing substantively new is contained in the present complaint, which merely alleges that an unlawful monopoly and conspiracy, created during 1943-1949 continues to the present and has injured plaintiff. If the conduct complained of during 1943-1949 was not unlawful, the continuance of that conduct cannot be unlawful. The monopoly and conspiracy issues,

based on events occurring during the 1943-1949 period, are common both to "*Vogelstein #1*" and to "*Vogelstein #3*", the present complaint. Consequently the resolution of those issues in "*Vogelstein #1*" operates as an estoppel in these subsequent proceedings against the parties bound by the original action.

The Supreme Court in *Cromwell v. County of Sac.*, 94 U. S. 351, 353 (1876), quoting Lord Ellenborough, said:

> "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

Also see *United States v. International Building Co.*, 345 U. S. 502 (1953).

It makes no difference, so far as the issue before us is concerned, whether or not defendants' conduct is regarded as a series of individual torts or as one continuing tort. What is important is that there was an *adjudication* on the monopoly and conspiracy issues in *Lawlor*. Those issues were common and crucial to each of Vogelstein's complaints. By stipulation the findings in *Lawlor* were made applicable to "*Vogelstein #1*". The combined effect of the trial of *Lawlor* and the stipulation, therefore, was a determination that defendants did not unlawfully conspire or monopolize and Vogelstein is bound by that determination. The stipulation was designed to avoid repetitive and protracted litigation. It sought to do so by the resolu-

tion, for all the cases, of the two crucial issues common to all, i.e., monopoly and conspiracy.

It is true that the judgment in favor of defendants in *Lawlor* is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in *Lawlor* had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependent upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer.

The stipulation, as we interpret it, covered not only existing claims for damages but subsequent claims as well, where those claims are based on the same alleged acts of conspiracy and monopoly as were before the Court in *Lawlor* and in plaintiffs' original complaint. Indeed, the parties themselves so interpret it. Mr. Anderson, counsel for plaintiffs in *Lawlor* and also counsel for plaintiffs in the instant case, in referring to what we have labeled "*Vogelstein #2*", stated that it was merely supplemental to the original complaint; the former simply brought the latter up to date. We can perceive no difference in the character of "*Vogelstein #2*" and the complaint now before us. The present complaint merely brings "*Vogelstein #1*" and "*Vogelstein #2*" up to date. Therefore, a determination, after a full hearing on the merits of crucial issues, which, by stipulation, disposed of "*Vogelstein #1*", is also dispositive of the matter before us.

Plaintiff relies on *Lawlor v. National Screen Service Corporation*, 349 U. S. 322 (1955) [3] for the proposition that neither the principles of *res judicata* nor of collateral estoppel operate as a bar to the present suit. However, the facts in the *Lawlor* case distinguish it from the matter before us. In 1943 the case of *Allied Poster & Supply Corporation v. National Screen Service Corporation*, Civil Action No. 2472, an antitrust action started in 1942, was settled prior to trial. Plaintiffs therein withdrew that suit which was dismissed "with prejudice". Thereafter, Lawlor, one of the plaintiffs in Allied and a party to the settlement, instituted another antitrust action against the same defendants. Defendants' plea of *res judicata* was rejected by the Supreme Court. No question of collateral estoppel was involved because the case had never been tried. In order for parties to be subsequently precluded from challenging issues there must first be findings on which the determination of those issues was based. In *Lawlor* there was no adjudication and there were no findings. *Res judicata* was also inapplicable since the judgment was unaccompanied by findings and the parties were not bound on any issue.

The Supreme Court concluded that the 1943 action and the suit before it were not based on the same cause of action because:

(a) the conduct complained of occurred after the 1943 judgment;

(b) new antitrust violations were alleged;

(c) the claims sued on could not have been sued on in the prior action;

(d) in the interim alleged substantial changes in the scope of the monopoly had occurred.

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3. This reference is to one of the pretrial proceedings in the *Lawlor* case to which we have many times referred above.

Both *Lawlor* and the matter before us involve subsequent antitrust actions after previous complaints had been dismissed. At this point similarity ends. The most significant difference is that in the instant case there was a previous adjudication of the issues and although this was accomplished by means of a "test case" and stipulation, it in no way diminishes the fact that there were findings on the issues of conspiracy and monopoly.

At argument on the motion to dismiss the Court asked counsel for Vogelstein if he had any additional evidence over and above that presented at the *Lawlor* trial. His reply was, in effect, that the case *might* be tried differently, or that it *might* be tried by other counsel who *might* present the case in a different fashion. At no time did he indicate to the Court that he was in possession of additional evidence to present, only that the case might be differently tried (and tried to a jury rather than to the Court alone).

Vogelstein has not alleged that the scope of the alleged monopoly has increased since the *Lawlor* trial, and in fact, the contrary may be true. All of Vogelstein's complaints, including the present complaint, are founded upon the exclusive licenses given by the movie producers to National Screen. Those exclusive licenses were held not to constitute a monopoly in *Lawlor*. Since that time, as part of the litigation in *Lipp v. National Screen Service Corporation, supra*, Judge Kraft, in a Memorandum Opinion filed May 31, 1961, found that National Screen has been operating under non-exclusive licenses from the major motion picture producers since 1952. In addition, a consent decree was entered into in the Southern District of New York on March 29, 1957 by which the major motion picture producers agreed to grant only non-exclusive licenses to producers and distributors of advertising accessories. 1957 Trade Cases ¶ 68,670. That circumstance can only serve to weaken Vogelstein's claim.

Plaintiff suggests that the Court, in *Lawlor*, did not find that there were no antitrust violations, but found only that plaintiffs in that case failed to prove a violation of the antitrust laws. There is nothing in the terms of the stipulation indicating that Vogelstein was not to be bound by the stipulation if *Lawlor* fell because of a failure of proof. He agreed to be bound by the resolution of the conspiracy and monopoly issues in *Lawlor*. The Court in *Lawlor* found no unlawful conspiracy or monopoly. (Conclusions of Law 2 and 3). The distinction which Vogelstein now asserts is more semantic than legal.

We turn our attention now to the amendment to "*Vogelstein #3*". That amended complaint was filed, without leave of Court, subsequent to, and unquestionably as a result of questions asked by the Court during oral argument on the motion to dismiss "*Vogelstein #3*". The amended complaint is the same as "*Vogelstein #3*" with the exception that it contains the additional allegation that National Screen, with the knowledge and consent of the other defendants, has, since May 16, 1961, discontinued making standard accessories available to Vogelstein thereby compelling him to go out of business.

Accepting that additional allegation as true, we are not led to a different conclusion. The refusal to supply accessories to Vogelstein lacks significance absent a setting of conspiracy or monopoly. The amended complaint alleges no facts which would supply that setting. On the issues of conspiracy and monopoly Vogelstein is still relying on the allegations contained in "*Vogelstein #1*" and we have earlier determined that on those issues, for the period covered by "*Vogelstein #1*" (1943-1949), he is now precluded.

The Court in *Lawlor* found during the period 1943-1949: that National Screen did not monopolize nor attempt to monopolize (Conclusion of Law 2); that none of defendants conspired with each other (Conclusion of Law 3); that National Screen was in competition with plaintiffs

(Finding of Fact 126); that National Screen made standard accessories available to twenty-four sub-licensees, eleven of whom were not parties to the *Allied* settlement (Finding of Fact 115); that there was nothing to indicate that plaintiffs could not manufacture or obtain the right to manufacture or fabricate any kind of accessories, in fact poster dealers throughout the United States other than plaintiffs manufactured and distributed various advertising accessories (Finding of Fact 116). The Court of Appeals, summarizing the findings in *Lawlor*, stated that "each of the film companies involved in this suit entered into the contracts [with National Screen] for a good and sufficient economic reason, namely to terminate an unprofitable feature of its business". *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146, 151 (3rd Cir. 1959). Finally, by 1952, National Screen was operating under non-exclusive licenses, and this was certainly the case after 1957 (*supra*, p. 1617).

That the refusal to supply accessories to Vogelstein is insufficient to upset the foregoing basic findings is apparent from the following statement by the Court of Appeals in *Lawlor v. National Screen Service Corporation*, 270 F. 2d 146 (3rd Cir. 1959), at pp. 154-155:

> "Plaintiffs have never attempted to obtain from any of the film companies licenses under which they themselves would manufacture accessories and, in fact, have expressly stated that they do not desire such licenses. In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an antitrust action.
>
> • • •
>
> "It is abundantly clear to this court that the plaintiffs, by their own choice, are nothing more than jobbers in the field of standard accessories, and thus come within the purview of cases involving exclusive dealer-

ships such as *Locker v. American Tobacco Co.*, 2 Cir., 1914, 218 F. 447 at page 450, where it was stated: 'We are unable to discover anything illegal in a manufacturer of tobacco disposing of his goods to a jobber to sell to retailers, or, if he deems it advisable, to change his policy, and sell direct to the retailer himself. Why may he not do so? One who desires to become a jobber has no right to complain because the manufacturer chooses another to do this work, unless the manufacturer owes some duty to consign his product, or a part of [sic] thereof, to him.' "

The above enumeration of the deficiencies in the *Lawlor* case guides our evaluation of Vogelstein's present attempt to supply those deficiencies. The single additional allegation in the amended complaint avails him little in that regard.

The amended complaint does not reveal any attempt by Vogelstein to secure a license for himself, nor any indication that such a license could not be obtained. It refers still, by incorporation of previous pleadings, to "exclusive" licenses, a situation which no longer exists. No facts are averred to meet the statement by the Court of Appeals that National Screen may refuse to supply all poster dealers including Vogelstein.

We cannot view this complaint in a vacuum. It is part of a continuum of litigation between the parties. We are bound to consider the *Lawlor* adjudication and the stipulation. Cf. *Poster Exchange, Inc. v. National Screen Service Corporation*, 198 F. Supp. 557 (D. C. N. D. Ga. 1961).

For the foregoing reasons the motions to dismiss the complaint and the amended complaint will be granted.

In view of the ruling on the motions to dismiss it is unnecessary to reach the issue raised by defendants as to security for costs.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 14,056.

HARRY VOGELSTEIN, TRADING AS BALTIMORE POSTER COMPANY,

Appellant,

v.

NATIONAL SCREEN SERVICE CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed December 20, 1962.)

Before KALODNER and FORMAN, *Circuit Judges*, and ROSENBERG, *District Judge*.

PER CURIAM: Upon review of the record we find no error.

The Order of the District Court, 204 F. Supp. 591, will be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER, TERM, 1970

No. 1001

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

versus

THE POSTER EXCHANGE, INC.,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

I

Preface

The court below, saw fit to characterize petitioner as a "grossly predatory" monopolist. (Appendix to petition, p. A. 30).

That characterization was based upon facts many

of which are not mentioned in petitioner's disjointed statement.[1]

Respondent, therefore, submits the following as a full and true statement of all the main facts of the case in chronological order.

II

The Birth Of The Business of Poster Renting

The business involved is that of supplying motion picture exhibitors with advertising posters, known as standard posters, or standard accessories.

These posters are displayed by virtually all exhibitors on the outside and in the lobbies of their theatres. They are used to draw attention to the particular merits of the picture being exhibited and also to coming attractions, and therefore, of course, a special set of posters is made up for each feature picture.

Originally the posters were produced and distributed solely by the producers of the respective pictures.

Instead of giving their advertisements away, however, — as almost all other manufacturers do — the film companies required the exhibitors to buy them, and it is this extraordinary practice that provided the foundation for this litigation.

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[1]This statement consists primarily of a rehash of the statement of facts contained in an opinion of a court of appeals of another circuit written in 1959 in connection with another case which was decided on the basis of facts not present in this case.

More fully, in all the larger cities every feature picture is exhibited a number of times, on successive runs, in different, subsequent-run theatres, and therefore the practice of requiring every exhibitor to buy a new set of posters was wasteful, because the physical make-up of the posters was such that they could be used more than once.

Recognizing this, a number of small independents, or jobbers, began the practice of acquiring extra supplies of posters, for all feature pictures, and renting them, instead of selling them, to the exhibitors operating in their particular localities, thereby using the same posters over and over again, and offering reduced prices.

These independents became known as poster-renters.

The film companies made supplies freely available to the poster-renters, and their businesses grew and prospered. As petitioner itself says (at page 5): "By 1940 there was at least one poster-renter in business in nearly every motion picture exchange area in the United States."

III

Invasion of the Business by Petitioner. Petitioner's Resort to Exclusive License Agreements

For many years prior to 1940, petitioner was a national distributor of motion picture advertising "trail-

ers," or "pre-vues," (which were short films exhibited on the theatre screen) but kept out of the business of renting standard posters.

Late in the year 1939, however, petitioner conceived and launched a plan or scheme to eliminate all of the existing poster-renters, and, with the help and connivance of the film companies, to appropriate to itself the entire poster-renting business on a national scale.

More specifically, in the early part of 1940, petitioner obtained from two major film companies (known by the short names of "Paramount" and "RKO") expressly exclusive licenses by the terms of which only petitioner would be permitted to obtain supplies of standard posters for distribution anywhere in the United States. (Exh. P-1 and Exh. P-2)

The intent to exclude the previously existing poster renters is obvious from the express terms of the contracts and also from other documents.

For instance, on January 27, 1940, petitioner's general sales manager, George F. Dembo, addressed a letter of instructions to the "Entire Sales Personnel," reading in pertinent part as follows (Exh. P.-24):

> "On February 1st, National Screen Service takes the second most momentous step of its business career. The first occurred with the creation of the company some twenty-one years ago when the trailer was conceived. Now it is Advertising Accessories, Inc., the corpo-

rate subsidiary that will handle the Standard lobby accessories formerly serviced by the producer-distributors.

"ON FEBRUARY 1st WE BEGIN SERVICE ON PARAMOUNT AND RKO PICTURES. ABOUT FEBRUARY 15th WE WILL HAVE SERVICE AVAILABLE ON UNIVERSAL. OTHERS WILL FOLLOW. AND AS RAPIDLY AS SUCH ARRANGEMENTS ARE CONSUMMATED YOU WILL BE NOTIFIED.

....

"Remember this, for it is extremely important — our immediate objective is to serve all material exclusively on a rental basis. Under no circumstances or condition is there to be an outright sale. This is a departure from customary practice. We are well aware of it, and for that reason want to caution you now about it. There cannot be any extenuating circumstances of any kind that could possibly persuade us away from this decision. Actually it is more than a decision. Our agreement with the companies we represent on Standard accessories restricts us solely to a rental handling basis and under no pretext, and not at any price, do we have the right to sell this material.

....

"We are aware of the opposition that you may receive from circuits that have their own accessories departments for relay purposes, and likewise the **poster renter** that will require our

lithographs and photos for their own rental plan. We have given this angle considerable thought and have decided upon the concession of permitting thirty days' notice to any circuit that may object on the ground that they have not been allowed sufficient advance notice covering our method of operation. For these cases, and the length of time specified, we are permitted (under authority received from the distributors) to continue the outright sale of material, but we want it confined strictly to the 'must' cases. Under no consideration, however, is this to apply to a **poster renter.** Consequently, caution must be exercised in the distribution of these exceptional outright sales, so that the material does not finally find its way into the hands of the **poster renter.** . . ." (emphasis supplied).

The immediate effect of this was to cause twenty-eight poster-renters to sell out, bag and baggage, to petitioner. These sales took place between February 1 and August 1, 1940.[2]

Other poster-renters, however, refused to sell, but they were compelled — for a time — to get along as

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[2]In passing on a question of petitioner's veracity, the trial judge said, in effect, that he could hardly believe the petitioner "... in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by acquiring their businesses by outright purchase": (Appendix to petition, p. A.16).

best they could without any authorized access to posters for Paramount and RKO pictures.

IV

Petitioner's Resort to Sublicensing

For some reason not shown by the record it was not until February 6, 1942 that petitioner obtained its third expressly exclusive license at which time Loews, Inc., (also known as M-G-M) joined the plan (Exh. P-3).

As a result of this, thirteen of the still-surviving poster-renters commenced an antitrust suit in the United States District Court for the Eastern District of Pennsylvania against petitioner and Paramount, RKO and Loews. This suit was commenced on April 8, 1942, and became known as the "Allied" suit.

One year later — in April 1943 — the Allied suit was settled by a compromise agreement, the principal feature of which was that petitioner agreed to give to each of the thirteen plaintiffs a written sub-license enabling him to buy from petitioner, at fair prices, unlimited supplies of standard posters with respect to which petitioner had obtained, or might thereafter obtain, an exclusive license agreement.[3]

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[3]Respondent was not one of the plaintiffs in the Allied suit, and, as will hereinafter more fully appear, respondent was never granted a sublicense.

Following the settlement of the Allied case, petitioner continued to obtain expressly exclusive license agreements from other major film companies, with the result that by 1947 petitioner was in possession of an expressly exclusive license, to rent standard posters in the United States, from all of the eight[4] major American film companies. Specifically, petitioner's acquisitions following the settlement of the Allied case were as follows:

Licensor Film Company (short name)	Date of Exclusive License Agreement
Universal	August 1, 1944 (Exh. P-4)
Columbia	April 12, 1945 (Exh. P-5)
United Artists	January 21, 1946 (Exh. P-6)
Warner Bros.	March 22, 1946 (Exh. P-7)
Fox Film Co.	July 1, 1947 (Exh. P-8)

Prior to the signing of each of these five contracts, the poster renters, and also the petitioner, obtained their supplies of posters by buying them directly from the respective film companies, but after each contract was signed petitioner, of course, (because of the expressly exclusive provisions)[5] became the only person

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[4]At the time involved these eight companies constituted over 90% of the motion picture industry (R. 1282).

Note: The references in this brief are to the pages of the Record filed in the Court of Appeals.

[5]It is not disputed that all of the eight contracts of the 1940's were expressly exclusive. For example, the FOX contract (Ex. P-8) provided in section THIRTEENTH as follows:

> "... FOX agrees that it will not during the term of this agreement grant to any person, firm or corporation other than SCREEN, any license to distribute or

able to deal with the film-company licensor, and therefore all the other renters had to look to petitioner — their giant competitor — for all of their supplies in accordance with their sublicense agreements. For a number of years, petitioner complied with its sublicense agreements, and thereby kept a number of competitors in business, but (as will hereinafter more fully appear) on May 16, 1961 — in accordance with notice given on February 15, 1961 — petitioner unilaterally and absolutely discontinued the practice, thereby leaving all competitors without any possible source of supplies.

V

Petitioner's Stated Reasons For Wanting Exclusivity

With respect to petitioner's explanation of the reasons why the first license agreement (which was made with Paramount in 1940, as aforesaid) was made exclusive, the record shows that in another proceeding petitioner itself said:

> "In the latter part of 1939, Paramount Pictures, Inc., desiring to avoid future losses which continuance of the production and distribution of standard accessories entailed, approached National Screen with a proposition

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manufacture (and FOX will not itself distribute) within the territory of this agreement, any standard accessories based upon FOX motion pictures...."

In section SECOND the territory covered was described as "the territory of the United States of America (including Alaska and Hawaii, but not its other territory and possessions)".

> for the turning over of this function to National Screen. To ensure wide and prompt distribution of standard accessories to its customers, Paramount Pictures, Inc. required National Screen to operate a local branch in each city where Paramount Pictures, Inc. had a film distributing exchange. National Screen was required to open new exchanges throughout the country at its own expense and to employ the required sales staff in each exchange....
>
> "The opening of new exchanges throughout the country required National Screen to assume leasehold and other obligations and required an investment involving millions of dollars. To protect its investment, National Screen in its negotiations with Paramount Pictures, Inc. required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five year term."*

There is nothing on the record to show what reasons petitioner had for wanting and obtaining the expressly exclusive provisions in the seven subsequent agreements, but in the petition filed it is stated that (p. 6):

> "Similar considerations were involved in the other Producers' standard-accessory arrangements with National Screen."

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*These statements were made by petitioner in the form of requests for findings of fact filed of record in the case of *Lawlor v. National Screen Service Corp.*, Civil Action No. 10,020 (E.D. Pa., 1958)

VI

Petitioner's Profit Sharing

With respect to consideration — moving from petitioner to the film companies — each contract required petitioner to pay a share of its profits (usually 50%) to the film company licensor. As a result of this, petitioner has paid each film company many thousands of dollars every year for the privilege of distributing that film company's advertising posters. Petitioner admits — or proclaims — (p. 6) that the film companies' reasons for contracting with it was that they had been losing money "in their accessories business."

VII

Means of Production of Standard Accessories

The petition (pages 2, 5, 6) represents that standard posters are "created" and "produced" by petitioner, but that is incorrect.

The contracts plainly show that the posters have always been produced by professional lithographers on the basis of drawings, sketches and other art work prepared by artists working in the studios of the film companies, and paid by them.

The only change made by the contracts was that the film companies agreed to deliver the art work to petitioner (upon payment of a fee) instead of sending it directly to the lithographers (referred to in the con-

tracts as "vendors"). This, of course, enabled petitioner to place the orders for reproduction with the lithographers, and thus obtain exclusive possession of all posters produced.

For illustration, petitioner's contract with *Fox Film Corp.*, (made June 30, 1947, as aforesaid) provided, in pertinent part, as follows (Ex. P-8, p. 3):

"*FIFTH*

"*PREPARATION AND MANUFACTURE OF STANDARD ACCESSORIES HEREUNDER*

"It is the intention of the parties that all standard accessories distributed hereunder will be prepared and manufactured in the same manner (unless otherwise herein provided) as prior to the execution of this agreement, or as according to the then custom of the trade if FOX so requests, except that during the term of this agreement the orders for such manufacture from the vendors and the payments for such manufacture to the vendors will be made directly by SCREEN. It is, therefore, understood as follows:

1. Art Work

"FOX shall prepare its own rough sketches, finished drawing (color or otherwise), visuals and layouts and shall furnish SCREEN direct, or its designated lithographer or manufacturer

> of standard accessories herein, the necessary finished art work from which the various standard accessories are to be made, and SCREEN shall pay to FOX for such finished art work a sum of Two Hundred and Fifty ($250.00) Dollars for each regular feature release and a sum of Five Hundred ($500.00) Dollars for each special feature release, . . ."

Substantially the same provisions are contained in all the other seven exclusive contracts.

It is true that the contracts required petitioner to pay the charges of the lithographers for producing the posters, but this was part of the consideration paid by petitioner for its exclusive privileges. In other words, the posters always remained the property of the film-company licensors.

For example, all the contracts provided that:

> "Screen shall not give away the standard accessories licensed hereunder, nor sell nor otherwise pass title from Screen to such standard accessories . . ."
> (Exh. P-8 at p. 1).

Furthermore, the FOX contract, for example, contained a provision with respect to copyrights as follows (Exh. P-8, p. 23):

> " . . . SCREEN will affix or cause to be affixed to each standard accessory distributed

> hereunder the following copyright notice: 'Copyright (194) Twentieth Century Fox Film Corporation', and SCREEN will permit no act of commission or omission which will destroy or impair the copyright of any material furnished by FOX to SCREEN hereunder . . ."

All other contracts contained substantially the same provision.

It is therefore incorrect to represent petitioner as either the producer or the owner of standard accessories.

Petitioner is and always has been, like respondent, and all other poster renters, a mere distributor. The only material difference is a difference in size.

VIII

The So-called "Non-Exclusive" Renewal Agreements

Almost all of the expressly exclusive agreements expired at the beginning of the year 1950, and were replaced by nominally "non-exclusive" renewal agreements, but no substantial changes were made, and the result was that petitioner retained practically all of its previously held exclusive privileges.

The reason for this is that although the 1950 renewal agreements provided that the film companies might grant licenses to distributors other than peti-

tioner they also expressly provided that no applicant could be granted a license unless he had, or would guarantee to get, a national distribution organization, and would undertake to do business on a national scale, all of which, as has been seen — would admittedly require an investment of "millions of dollars", and as far as can be ascertained from the record in this case no poster renter other than petitioner has ever dreamed of having that much money.

For illustration, the FOX 1950 renewal agreement provided, in pertinent part, as follows (Ex. P-14, p. 35-37):

"THIRTY-FOURTH

"FAVORED NATION CLAUSE TO SCREEN: RESTRICTIVE COVENANT AGAINST FOX

"....

FOX further covenants and agrees that it shall be the essence of this agreement that no license shall be granted to any other licensee in respect to standard accessories, specialty accessories and trailers on 'Fox motion pictures' unless such license shall be in the form of a written agreement and shall require (a) that the licensee shall be obligated to manufacture or cause to be manufactured or produced and to distribute all three items, to wit, standard accessories, specialty accessories and trailers, and (b) that the licensee shall be obligated to distribute standard accessories, spe-

cialty accessories and trailers of 'FOX motion pictures' on a 'national basis.' The term 'national basis' is herewith defined to mean the ownership, operation and maintenance of exchange offices and employment of adequate and efficient personnel therein, throughout the exchange center cities where SCREEN is required under the terms of this agreement to own, operate and maintain exchange offices in connection with the distribution of standard accessories, specialty accessories and trailers of 'FOX motion pictures' hereunder. FOX agrees to furnish to SCREEN upon request a copy of any agreement which it may enter into with any other licensee, and in any event FOX shall notify SCREEN promptly upon its granting a license to another licensee of the happening of such event."

.....

Commenting on the foregoing, the court below aptly said (Appendix to Petition, p. A. 26-A. 27):

"... In order for another company to have acquired a license it would have had to make a multi-million dollar investment. The producing companies under their 'Most Favored Nation' clauses required nationwide distribution facilities, full line producing and direct competition with National Screen's already established organization. Moreover, Poster was only a local distributor-jobber. And the District Court was entitled to conclude that Post-

er cannot be required to convert the nature of its business, make a multimillion dollar investment and become a nationwide distributor just to survive in the Atlanta area. See United States v. Aluminum Company of America, Inc., 2 Cir. 1945, 148 F. 2d 416."

IX

Petitioner Reverts to Exclusivity Termination of the Sublicensing System

The petition states, (p. 6) — and it is not disputed — that as a result of the compromise settlement reached in the Allied case, in 1943, petitioners "entered into sublicense agreement with twenty-four poster renters, including eleven who were not parties to the case."

In other words, petitioner, for a time, actually created and nourished its own competitors in at least twenty-four cities in various parts of the country.

All of these sublicenses expired long before 1961[7] but for some reason or other petitioner continued to pump the blood of life into a goodly number of competitors until May 16, 1961, when, as aforesaid, petitioner unilaterally and absolutely discontinued the practice.

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[7]No sublicenses were granted after 1950 (R. 1112).

In other words, on May 16, 1961, petitioner put its virtually complete monopoly power into full force and effect with the result of eliminating practically every vestige of competition throughout the nation.

In the trial court petitioner contended that its reason for the 1961 cut-off was that it had been losing money in the standard-accessory phrase of its business, and that, therefore, its action was a "legitimate exercise of business judgment"; but the alleged losses were based upon the conclusions of a bookkeeper in allocating home-office expenses (because petitioner's business as a whole was admittedly not in the red) and in view of all the evidence the trial judge rejected the contention and found that the real reason for the cut-off was petitioner's intent to eliminate its competitors.

More specifically, the trial court found (Appendix to Petition A. 10):

> "24. The evidence does not support the defendant's position that its refusal to deal with the plaintiff was dictated by sound business policy."
>
> "25. The Acts and conduct of the defendant described above were clearly with the intent of eliminating the plaintiff as a competitor in the Atlanta Exchange Area . . ."

X

Petitioner's Extraordinary Treatment of Respondent. — Respondent Never Granted A Sublicense

The respondent — a corporation — began doing business as a poster renter in the City of Atlanta, State of Georgia, in 1941.

At that time respondent was able to, and did obtain all desired supplies of posters directly from all of the eight major film companies notwithstanding that, as aforesaid, petitioner had acquired two exclusive contracts in 1940. The apparent reason for this is that petitioner did not get into full operation in the Atlanta area until some time after respondent opened for business in 1941.

As aforesaid, all of respondent's subsequent requests for a sublicense were refused,[8] but until the 1961 cutoff petitioner always allowed respondent to buy at least some amount of supplies over which petitioner, from time to time, acquired control, as aforesaid.

As far as the record in this case discloses, those poster renters to whom petitioner granted sublicenses

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[8]At the trial petitioner's general sales manager testified that the reason for refusing to give respondent a sublicense was that one of respondent's stockholders was a stockholder also in another poster-renting company doing business in another part of the country, and, as the witness said (R. 764):

> "We didn't mind the individual exchange centers having an operation but we didn't want to have the big bugaboo of one man operating ten or twelve exchange centers against us."

were always able, while the system lasted, to obtain adequate supplies at reduced and fair prices, but as the evidence in this case shows, respondent was very frequently unable to obtain a sufficient amount of supplies, and always had to pay over-the-counter prices, which were substantially higher than the prices paid by the sublicensés (R 207). The sublicensees were authorized to place "standing orders" under which adequate supplies for all feature pictures of all producers were automatically shipped to the offices of the sublicensees, (Exh. P-47) whereas respondent was required to go to petitioner's local exchange in Atlanta and try to buy supplies over the counter, just as any member of the public might do (R 99-100).

XI

Proof of the Fact of Loss and Amount of Damage

The witness, William Gearing, testified that he began working for respondent in 1946 or 1947 (R. 537) and that he was practically in charge of the business from 1954 to 1962 (R. 538); that when he started working he had about 200 accounts — meaning that he serviced about 200 theatres (R. 539); that over the years the quantity of supplies he could obtain was so limited that he was able "to service about half, a little over half of the customers" (R. 207) and that the other half "stopped doing business with us and started doing business with National Screen" (R. 207).

This evidence, besides being uncontradicted, is borne out by all the other evidence in the case.

Specifically, the undisputed financial data shows that during the four-year damage period (July 17, 1957 through July 16, 1961)[9] petitioner transacted about seventy-seven (77%) percent of the total business done in the Atlanta area in standard accessories, and the respondent only twenty-three percent, whereas the uncontradicted testimony of respondent's president, William Cobb, was that when respondent opened for business (in 1941) respondent "had 60 percent or 70 percent of the business" (R. 261).

With respect to prices, the witness, George Tarrant, testified that he was petitioner's branch manager from 1959 to 1962 (R. 88), and that respondent was charged the same price that was charged to respondent's potential customers — the exhibitors — when they desired to purchase, instead of renting, the posters (R. 99-101).

Petitioner's own witness (George Dembo, general sales manager) testified that a sublicensee could "buy all the material that he wanted" (R. 751) and "had a favored rate" (R. 766), and petitioner's local office manager, Charles Lester, testified that he would sell petitioner what he had "on hand," and added that: "But anything we were short of, he would just be out of luck" (R. 494-496).

Further with respect to amount of damage, petitioner proved that in the area involved (the motion

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[9]The trial judge found that the damage period in this case is the four-year period preceding the commencement of the suit on July 16, 1961: ((Finding of Fact No. 26, Appendix to the Petition p. A.11).

picture district of Atlanta, Georgia) the petitioner's net receipts — (gross receipts less cost of posters used) — during the four years immediately preceding the date of the filing of the complaint — was $436,745, whereas respondent's like receipts, for the same period, was only $119,292, — a difference of $317,453.

On the basis of this evidence, together with the federal four-year statute of limitations of actions, the trial judge found as a fact that (Appendix to the Petition p. A. 11):

> "26. The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint ..."

Accordingly, the court awarded respondent damages in the amount of $150,000, trebled to $450,000, which, as the Court of Appeals said, was substantially less than it might have been under the evidence.

ARGUMENT

I

There Is No Conflict With Either The Lawlor or Vogelstein Case

Vogelstein[10] itself cannot create a conflict because

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[10] *Vogelstein v. National Screen Service Corp.*, 204 F. Supp. 891 E.D.Pa. 1962) aff'd per cur. 310 F.2d 738 (3d Cir. 1962).

it was dismissed on a motion for summary judgment without any trial or other hearing on the merits. The basis for the judgment of dismissal was that Vogelstein had agreed — by a formal stipulation filed of record — to be bound by the results to be reached at the trial of the Lawlor case, and the trial of *Lawlor*[11] (to the court without a jury) resulted in entry of a judgment for the defendants.

Therefore the real question is whether there is a conflict with *Lawlor*.

The answer is that there is no conflict because *Lawlor* is distinguishable on its facts, and the court below has consistently taken that position.

The period of time covered in *Lawlor* was 1943-1949 (the suit having been commenced in 1949, and the statute of limitations being six years, at that time, under Pennsylvania law). Throughout those years, the plaintiffs in *Lawlor* were among National Screen's sublicensees, and in that capacity they received from National Screen ample supplies of posters at fair prices, as a result of which they were unable to show that they ever suffered any loss.

Specifically, the trial judge in *Lawlor* found the facts as quoted below:

> "73. From April 21, 1943, the date of the sublicense to the plaintiffs from National Screen,

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[11] *Lawlor v. National Screen Service Corp.*, Civil Action No. 10,020 (E.D. Pa. 1958) aff'd 270 F.2d 146 (3d Cir. 1959).

and throughout the period in suit the plaintiffs received from National Screen all of the standard accessories which they ordered..."

"122. During the period in suit, i.e., from 1943 to 1949, plaintiffs' business was progressively more successful, with increased gross volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year between 1943 and 1949."

"138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

As has been seen, respondent was never given a sublicense and as a result was frequently unable to obtain adequate supplies, and always had to pay excessive prices, as a result of which the trial court awarded respondent damages in the amount of $150,000, trebled to $450,000.

The court below first dealt with *Lawlor* in 1962 on National Screen's appeal from the refusal of the district court to enter summary judgment for National Screen on the strength of *Lawlor*. In affirming the district court, the court below said (*National Screen Service Corp.* v. *Poster Exchange, Inc.*, 305 F 2d 647, 652, Cir. 5, 1962):

> "National Screen relies heavily upon the well written opinion in the case of Lawlor v. National Screen Service Corp., 3 Cir. 270 F. 2d 146(1959) ....Attached to one of the affidavits of National Screen are a total of 140 findings of fact and 12 conclusions of law by Judge C. William Kraft, Jr ....Such findings and conclusions of the District Court are noteworthy. The court found that the plaintiffs in that case failed to submit evidence that National Screen ...failed to fulfill plaintiffs' requirements and requests for accessories ...and that the plaintiffs suffered no damage or injury to their business or property as a result of any action on the part of National Screen....
>
> "The facts and the period of time involved in the Lawlor case are substantially different from those under consideration in the instant case...."

It is therefore very plain that there is no conflict between the decision rendered in this case and the decision rendered in *Lawlor* or *Vogelstein*.

II

The Consent Decree Entered In The Government Suit Is Irrelevant And Immaterial

Some years prior to 1957 the Government filed a suit against all the parties to the exclusive license agreements alleging a conspiracy to monopolize and actual

monopolization. As stated by petitioner (p. 7) "The complaint specifically referred to, and sought relief for, the poster renters." In 1957 — without any trial or other hearing — consent decrees were entered prohibiting such exclusive agreements and requiring the film-company defendants to grant licenses to all "qualified" applicants. The trouble is that the decrees went on to say that no film company could be required "to regard an applicant as qualified unless he had, or would guarantee to get, national distribution facilities and would agree to do business on a national scale."

As has been seen (p. 7, *supra*) the admitted facts are that the cost of setting up national distribution facilities (requiring establishment of several dozens of district offices) amounts to "millions of dollars," and that petitioner itself insisted that it be given exclusive privileges before it agreed to make such an investment.

Petitioner says (p. 23): "There was no evidence and no finding that any Producer would in fact impose such requirements (except on National Screen)."

But there is no reason to think that any producer would favor anyone over National Screen, and, as has been seen, (p. 11, *supra*) the nominally "non-exclusive" renewal agreements of the 1950's contained a "favored nations section," in favor of National Screen, guaranteeing that no poster renter other than National Screen would be granted a license unless he had a national distribution organization.

All of the eight exclusive agreements of the 1940's very emphatically required National Screen to cover the nation. For example, the Fox agreement, in section fourteenth, provided as follows (Ex. P.-8, p. 21):

> "....
> SCREEN agrees that it will at all times during the term hereof maintain an adequate and efficient national sales force. Without limitation of the foregoing, SCREEN agrees that it will at all times during the term hereof, maintain an office with an adequate and efficient sales force in each city in the territory of this agreement in which FOX now maintains an exchange and SCREEN agrees that if in the future FOX opens any exchanges in the territory in cities where it does not maintain an exchange, SCREEN will likewise open an office with adequate and efficient sales force in such city, if and when two or more so-called major distributors besides FOX have exchanges in said City...."

Substantially the same provision was inserted in all of the other seven exclusive license agreements (Exhibits P-1 through P-7).

In view of this evidence, the trial judge found, in Findings Nos. 16 and 17 as follows (Appendix to Petition p. A. 7, A. 8):

> "16. National Screen's licenses from the major distributors have been nonexclusive since

> at least as early as 1957 and any qualified applicant as defined by said consent decree has been free to negotiate with the major distributors relative to obtaining nonexclusive licenses to manufacture standard motion picture accessories. However, the distributors of motion picture films have traditionally insisted that licensees to manufacture its accessories have national distribution facilities, and since National Screen is the only concern meeting such requirement, National Screen is the only concern in fact licensed to manufacture and distribute standard accessories on films distributed by or through the major motion picture distributors."
>
> "17. Plaintiff herein does not have nor has it ever had facilities or resources to manufacture or national distribution facilities with which to distribute standard motion picture accessories. Plaintiff has never been engaged in the business of manufacturing accessories."

Clearly, therefore, the trial judge drew the inferences differently from petitioner, and, in view of the evidence, the court of appeals did not err in sustaining the findings.[12]

Petitioner also argues a second point based upon a letter written by National Screen and read into the

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[12]It should be noted that the consent decree has had no beneficial effect because, as the trial judge found, no licenses have been granted other than to National Screen.

record by one of the assistant attorneys general engaged in handling the case.

This remarkable letter, written on the letterhead of National Screen Service Corp., and signed by its president, Herman Robbins, is quoted below:

"Dear Judge Hansen:

"Re: United States v. National Screen, et al.

"In connection with the discussions leading up to the entry of the consent decree in the above case, we wish to advise you that it is the intention of National Screen to continue serving poster renters for a period of one year from the date of entry of this decree.

"Very truly yours,

"Herman Robbins."

On the basis of that letter petitioner poses the following argumentative question (p. 25):

"...How could the courts below find that National Screen's 1961 refusal-to-deal was motivated by a 'specific intent to monopolize' and 'would result' in a 'monopoly' (A. 26 n.12) in the face of the fact that National Screen had been assured by the Government's judgment that a refusal to deal with the poster renters,

> after one year from entry of the judgment, would not constitute monopolization if the Producers and National Screen abided by the judgment?. . ."

There are several good and sufficient answers to that question.

First, the letter is obviously nothing but a wholly gratuitous self-serving declaration. As the petitioner itself admits (p. 7) the consent decrees were entered without any trial on the merits, and "without determination of any issue by the court," and therefore, of course, the court could not reasonably have placed any kind of limitation on the future existence of the poster centers. The letter, of course, was not made of part of the decrees.

But even if the court had incorporated the letter into the decrees the rights of respondent could not be in any way or to any extent affected thereby.

For this Court has definitively held that the private suit is such a vital and wholly independent means of enforcing the antitrust laws that none of the rights of the private plaintiff can ever be impaired by the results reached in a Government case: *Fox Publishing Co. v. United States*, 336 U.S. 683 (1961).

In the above cited case, the Court, in a unanimous opinion, said:

"We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." (366 U.S. at 689)

"...just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation ... Indeed sec. 5 of the Clayton Act (15 U.S.C. sec 15) making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a section 4 private suit would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relative to the same subject matter." (366 U.S. at 690).

Petitioner argues that "...the business community and the bar must not be left in doubt about the effect which a judgment entered in a government suit will be given in subsequent private litigation..." (p. 26) — as if there could be any such doubt in view of *Fox Publishing Co.* But then again petitioner does not cite *Fox Publishing Co.* Perhaps it was overlooked.

III

The Evidence Amply Sustains The Trial Judge's Award of Damages In The Amount Of $150,000, Trebled to $450,000.

Petitioner argues that respondent was entitled to recover only for losses sutained during the nine-week period beginning May 16, 1961 (when petitioner cut off furnishing supplies of posters) and July 17, 1961, (when respondent's suit was commenced.)[18]

The only thing said in the petition to support the conclusion that the beginning date is May 16, 1961, is contained, under another heading, in footnote 20, page 20, as follows (citations omitted):

> "20. That the refusal to deal after May 16, 1962 was the gravamen of Plaintiff's complaint and amended complaint is clear. This was confirmed by Plaintiff's pre-trial statements of contentions and issues, submitted just before the trial. . . ."

The petition does not set forth the text of any of the statements which are said to make clear that the

---

[18]Petitioner has constantly tried to make this case appear as a typical refusal to deal case, commencing with the May 16, 1961 cut-off of supplies. But that is a false picture of the case. As has been seen (p. 8-10, supra) petitioner is not the producer of standard accessories. Like respondent, petitioner is a distributor only, in competition with respondent. Therefore petitioner and respondent should not be dealing with each other at all.

gravamen of the case is the refusal to deal after May 16, 1961. The full texts were set forth in the briefs filed in both the trial court and the court of appeals, and both of those courts rejected petitioner's construction of the documents, and upheld respondent's contention that the claim made was for losses sustained during the four-year statutory period.

Specifically, the trial judge, in finding 26, found as a fact, as aforesaid, as follows (Appendix to Petition p. A. 11):

> "26. The period for which plaintiff is entitled to recover damages from defendant in the instant case includes the four years immediately prior to the filing of the complaint. The complaint was filed July 17, 1961, thus the period involved is 168/365 of the year 1957, all of the years 1958, 1959 and 1960, and 197/365 of the year 1961."

And in affirming that finding, the court of appeals said (Appendix to Petition, p. A. 25):

> "Second, National Screen contends that Poster ain pretrial response to a discovery request and in its pleadings, there had been admissions that precluded imposing liability for pre-1961 acts. But we think it is plain that the District Court did not read these as reflecting a final, absolute judicial admission; nor do we. At most they related solely on the ultimate issues as just a few more pieces of evidentiary

> footage, which the District Court could, but was not required to credit. As a last reel, the whole trial would have been a waste. That DeMille epic would not have been carried out if anyone, including the Judge, believed that Poster exchange after years of protest were now telling the Judge that until 1961 everything was rosy."

And later on in its opinion the court similarly said (Appendix to Petition p. A. 29):

> . . . .
>
> "National Screen's basic argument about the amount of damages is that Poster was entitled to recover damages only from the time of the complete refusal to deal in 1961. In final analysis, however, this contention rests on the argument that Poster had by pre-trial admissions abandoned its theory of liability for the pre-1961 acts and on the argument that the District Court's findings of fact regarding this period are not supported by the record. We have of course rejected both of these contentions. Thus on the findings we have credited that Poster was entitled to recover damages for that wrong as well as for injury resulting from National Screen's complete refusal to deal in 1961."
>
> . . . .

Since petitioner does not set forth the texts of the alleged admissions it is submitted that this Court

should assume that the courts below correctly decided the issue, and that, therefore, respondent is entitled to recover for losses sustained over the full four-year statutory period.

With respect to the amount of the award, the evidence upon which the trial judge based his conclusion of $150,000 is summarized at page 30 *supra*. It is obviously sufficient to sustain the award in accordance with the principles announced in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

Finally it is noted that at page 30 the petition erroneously states that the calculations were based upon "gross income" and "gross receipts." The fact is that the calculations were based on *net receipts*, in accordance with *Bigelow*. The court of appeals expressly said net receipts (Appendix to Petition p. 29, bottom of page).

CONCLUSION

For the foregoing reasons petitioner's prayer for a writ of certiorari should be denied.

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IN THE

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October Term, 1970.

No. 1,001.

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The most striking feature of the brief in opposition is Plaintiff's failure to meet any of the three questions presented by the petition.

In response to the **first** question and National Screen's argument that the decision below conflicts with that of the Third Circuit in **Vogelstein**, Plaintiff contents itself with arguing that the decision below does not conflict with the decision of the Third Circuit in **Lawlor**.

In response to the **second** question and National Screen's argument that the 1957 consent judgment in the Government case should not have been ignored by the courts below but should have been given some effect, Plaintiff argues that the consent judgment is "irrelevant and immaterial" because it is not binding on private litigants who were not parties to the Government case.

In response to the **third** question and National Screen's position that an award in the amount of $450,000 could not be justified under the **Bigelow** formula in the face of more-

precise evidence of damages amounting to only $1,350 after trebling, Plaintiff asserts only that the **fact** of damage before May 16, 1961 was established and that the statute of limitations permits Plaintiff to recover for the four-year period immediately preceding the filing of the complaint on July 17, 1961. Plaintiff fails to show any basis in either the findings or the evidence justifying the claim of damage before May 16, 1961 or any amount in excess of $1,350 after that date.

In short, Plaintiff totally evades the questions presented for review by the device of posing and answering arguments which National Screen does not make.

We shall briefly discuss each of the three questions presented and then certain other matters in the brief in opposition which require reply.

1. Concerning the Conflict With *Vogelstein*.

Plaintiff argues that there cannot be a conflict between the decision below and the decision in **Vogelstein** because **Vogelstein** was "dismissed on a motion for summary judgment" and on the basis of the plaintiff's stipulated agreement to be bound by the results reached after the trial in **Lawlor**. Plaintiff then proceeds to argue that **Lawlor** does not conflict with the decision below because **Lawlor** dealt with a different time period (1943-1949) and because the plaintiffs in **Lawlor** were unable to show that they had sustained any injury.

There is, of course, a basic conflict between the decision here and in **Lawlor** in that here the courts below found illegality in the Producers' license agreements to National Screen whereas the Court of Appeals for the Third Circuit found to the contrary after a protracted trial. But the instant case and **Vogelstein** involve identical legal issues in addition to those in **Lawlor**, and that is why we rely primarily on the conflict with **Vogelstein** as a ground for certiorari. As the district court noted in an earlier opin-

ion in this case, **Vogelstein** was an action "substantially similar to the case at bar" so that the decision there was "persuasive authority in this case."[1]

Plaintiff completely ignores the fact that the court in **Vogelstein** discussed at length the effect of the 1957 consent judgment and the effect of the 1961 refusal-to-deal, both of which were specifically raised in the pleadings in **Vogelstein**. Plaintiff is simply wrong when it says (Brief in Opposition, p. 23) that the basis for the judgment of dismissal in **Vogelstein** was the stipulation to be bound by **Lawlor**, which did not involve those issues. Those issues were decided differently by the court below and by the court in **Vogelstein**, which expressly considered and rejected the very arguments advanced by Plaintiff here.

The **Vogelstein** court, in considering the effect of the 1957 consent judgment, held that the judgment had assured that the licenses to National Screen were "certainly" nonexclusive "after 1957" (A.45). In contrast, the court below held that the consent judgment had left intact "nominally nonexclusive" licenses which were in fact exclusive (A.23) and, like Plaintiff, erroneously characterized National Screen's position, that action which it took in reliance on the judgment should be accorded at least presumptive validity, as a contention that the judgment should have "nationwide res judicata, collateral estoppel effect" (A.25).

Vogelstein dealt with a plaintiff who alleged that he had suffered damage precisely as Plaintiff here claims to have suffered damage as a result of the same 1961 refusal-to-deal—allegations which the **Vogelstein** court assumed to be true. Thus, **Vogelstein** is indistinguishable from the present case. **Vogelstein's** conflict with the decision below in the legal significance accorded to the 1957 consent judgment and the 1961 refusal-to-deal is irreconcilable.

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1. **Poster Exchange, Inc. v. National Screen Service Corp.**, 35 F.R.D. 558, 559 (N.D. Ga. 1963), *aff'd sub nom.* **Poster Exchange, Inc. v. Paramount Film Dist. Corp.**, 340 F.2d 320 (5th Cir.), *cert. denied*, 381 U. S. 936 (1965).

2. Concerning the Effect of the Consent Judgment.

Plaintiff argues that, since the 1957 consent judgment in the Government case is not binding, it is "irrelevant and immaterial," and that is precisely the way the courts below treated it.

National Screen recognizes that the consent judgment is not binding, but we urge that it is highly relevant and material and that action taken in reliance on it should have at least presumptive validity.

In support of its argument that the consent judgment is "irrelevant and immaterial," Plaintiff relies on **Sam Fox Publishing Co. v. United States**, 366 U. S. 683 (1961). While that case does, of course, hold that nonparties may not intervene in a Government antitrust suit as a matter of right because such nonparties are not bound by the outcome of the suit, it does not even remotely suggest that nonparties are not "in any way or to any extent affected thereby" (Brief in Opposition, p. 30). On the contrary, Mr. Justice Harlan's unanimous opinion for this Court clearly suggests the very opposite view (366 U. S. at 694):

> "Second, appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. Although there is no reason why such a court need consider the present decree as anything but a **minimum** towards insuring broader representation and more favorable income distribution should a claim for further relief be made out, **there is considerable weight to the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree.** . . . However, it is abundantly clear that this effect is not at all the equivalent of being legally bound, which is what

must be made out before a party may intervene as of right. . . ."[2]

It seems too clear for argument here that the court below—by refusing to give any effect whatever to the consent judgment and, in fact, condemning action taken in reliance on the judgment as a violation of the antitrust laws—did not consider the judgment as a "minimum towards insuring" competition in the standard accessory business or feel the least bit "constrained . . . to build on the foundations" of the judgment.

3. Concerning the Misuse of the *Bigelow* Formula.

The only arguments made by Plaintiff are that it was proper for the court of appeals to hold that liability could be imposed for what had occurred before May 16, 1961 and that there was some evidence that Plaintiff had suffered damage before that date. But that completely ignores the points made in the petition: (1) there was no finding by the district court that Plaintiff suffered any damage whatever before May 16, 1961; and (2) the court of appeals' holding that it did is not supported by the evidence on which the court of appeals relied—*i.e.*, the decline in the number of customers served by Plaintiff, which the evidence shows occurred **after** May 16, 1961, not before as the court of appeals thought. Plaintiff does not meet either of these points.

National Screen's position that there is no evidence of any damage to Plaintiff before May 16, 1961 is confirmed by the fact that the district court refused to make findings requested by Plaintiff (set forth below[3]) as to allegedly

2. Wherever boldface type is used in this brief, the emphasis is ours.

3. Plaintiff's requested findings on this point read as follows (Plaintiff's Requests for Findings of Fact and Conclusions of Law, pp. 7-8):

"20. Prior to May of 1961 because of the various restrictions imposed on plaintiff, limiting it to placing of ten

damaging restrictions imposed by National Screen on Plaintiff during the period before the May 16, 1961 refusal-to-deal. The court also refused Plaintiff's requested findings (set forth below [4]) as to an amount of damage calculated by comparing Plaintiff's net receipts for the four years before commencement of the action with National Screen's.

In view of the district court's refusal to make those findings, Plaintiff's chiding (Brief in Opposition, pp. 32-33) about our failure to quote the statements making clear that Plaintiff never claimed injury for the period before

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orders per day, and the placing of orders on only one day a week plaintiff was unable to obtain a sufficient supply of standard accessories to service its exhibitor customers.

"21. Defendant would refuse to sell plaintiff standard accessories when defendant would make available the same standard accessories to defendant's own exhibitor customers.

"22. As a result plaintiff survived in business to a limited extent by having its friendly customers acquire standard accessories from defendant National Screen and after using the same returning them to this plaintiff for its use in renting those supplies to its other exhibitor customers.

"23. As a result of its restrictive policies in making supplies available to plaintiff defendant captured 98% to 99% of the standard accessory market in the Atlanta Exchange Area (T. 91-92), and perfected its monopolistic control on the 'standard' accessory market to the extent that they were able to eliminate the use of salesmen to call upon exhibitor customers (T. 133 Metherne)."

4. These requested findings read as follows (*id.* at pp. 13-14):

"36. During the four year period in question defendant's gross income from its standard and specialty accessory business in the Atlanta Exchange Area was in the sum of $1,446,528.00. During the same period defendant's costs of material was $776,659.00.

"37. During the four year period in question the plaintiff's gross income was $277,829.00 and plaintiff's costs of material during the same period of time was $154,484.00.

"38. During the period in question by virtue of the monopolistic control of the market in the Atlanta Exchange Area and the defendant's refusal to deal with the plaintiff, plaintiff has been damaged in the sum of $556,535.00 (before trebling)."

the May 16, 1961 refusal-to-deal and that the refusal is the gravamen of the case is another irrelevancy about which no further comment is necessary.[5]

Plaintiff completely ignores the main thrust of National Screen's argument on the damage issue. Plaintiff does not even attempt to justify the court of appeals' unprecedented conclusion that "a comparison of the net receipts of the parties" (A.29) is appropriate here. Plaintiff limits its response to the bare, meaningless observation that the evidence "is obviously sufficient to sustain the award in accordance with the principle announced in *Bigelow*" (Brief in Opposition, p. 35).

It is axiomatic that the function of a damage award is to restore to the plaintiff that which he has lost. **Bigelow** permits the use of a comparison to measure that loss when more-precise evidence is unavailable, provided there is a rational basis for the assumptions implicit in use of the comparison.

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5. In its brief in this Court on an earlier petition for certiorari, Plaintiff conceded that, "Petitioner [National Screen] continued to sell to respondent [Plaintiff] its requirements of supplies of standard accessories until May 16, 1961. . . ." Brief for Respondent in Opposition, p. 5, **National Screen Service Corp. v. Poster Exchange, Inc.**, 385 U.S. 948 (1966).

Both the complaint and the amended complaint (¶ 16) alleged that, "Since May 16, 1961 National Screen has in fact pursued said announced policy of refusing to deal with plaintiff. In spite of requests by plaintiff to be allowed to purchase . . . from National Screen as in the past, National Screen has been and is refusing to deal with plaintiff . . ." (C.A. App. 9-10, 165-166). The only damage allegations were in paragraphs 23 and 24, which alleged that, "Plaintiff has already suffered substantial damages as a result of said refusal to deal [*i.e.*, the refusal-to-deal after May 16, 1961] including loss of profits and the loss of good will built up in connection with said business over a period of twenty years" (¶ 23) and that, "The amount of damages suffered by plaintiff can not be estimated with reasonable accuracy at this time, but if National Screen is not enjoined from said unlawful refusal to deal, plaintiff believes and so alleges that it will be damaged far in excess of $100,000.00" (¶ 24) (C.A. App. 13-14, 169).

Here, there was no rational basis for the court of appeals' use of a theory which assumed that Plaintiff should have done National Screen's volume of business during the four years preceding commencement of the action, that National Screen should have done Plaintiff's volume during that period and, therefore, that National Screen's larger volume should be confiscated and given to Plaintiff in the form of a damage award. There was no evidence which could possibly justify the assumption that, absent the matters complained of, National Screen's and Plaintiff's market shares would have been reversed, since both National Screen and Plaintiff were simultaneously engaged in the same business activity. In **Bigelow**, the fact that one theatre was given first-run pictures necessarily excluded the other theatre from simultaneously exhibiting those pictures, and it was, therefore, reasonable to assume that the plaintiff's theatre, which was at least comparable to defendant's, would have done as well with first-run pictures as defendant's. Accordingly, in such a situation, this kind of comparison is permissible in the absence of any more-precise basis for measuring damages. The only rational comparison available in this record was the comparison between Plaintiff's business before the May 16, 1961 refusal-to-deal and its business thereafter—a comparison which shows a loss of $400 to $500 weekly volume, for a total loss of profits amounting to $450 (Petition, pp. 27-28).

In **Bigelow**, this Court granted certiorari "because of the importance of the problem presented" (327 U. S. at 254). The court of appeals' misapprehension and misapplication here of this Court's **Bigelow** decision present an equally important problem in the administration of private antitrust litigation, which should be reviewed by this Court.

4. Concerning Miscellaneous Inaccuracies and Distortions.

Plaintiff's counterstatement of the case and other factual assertions in the brief in opposition bear no resemblance to the evidence or to the findings in the record in

this case. It would unduly lengthen this reply to discuss all of the instances where Plaintiff has colored and misstated the facts in an obvious effort to paint a villainous picture of National Screen, but a few examples will demonstrate the kind of game Plaintiff is trying to play:

a. On page 4 of the brief in opposition, Plaintiff says, without any record reference, that, "Late in the year 1939, however, petitioner conceived and launched a plan or scheme to eliminate all of the existing poster-renters and, with the help and connivance of the film companies, to appropriate to itself the entire poster-renting business on a national scale." At page 6, after quoting from an internal letter of instructions written by National Screen's sales manager in 1940, Plaintiff says, again without any record reference, that, "The immediate effect of this was to cause twenty-eight poster-renters to sell out, bag and baggage, to petitioner." There was no evidence submitted on this subject and, therefore, no finding. In **Lawlor**, after a protracted trial, the court found to the contrary.[6]

b. Plaintiff asserts that, "in view of all the evidence the trial judge rejected the contention" that National Screen's reason for the 1961 refusal-to-deal was that National Screen had been losing money in the standard accessory phase of its business (Brief in Opposition, p. 18). In fact, it was not "in view of all the evidence" that the dis-

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6. **Lawlor v. National Screen Service Corp.**, Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958). The district court's Finding of Fact 42 recited the fact of the poster-renter acquisitions, but the court rejected Finding 38 requested by the plaintiffs, which read:

> "At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States."

trict court rejected National Screen's argument that its 1961 refusal-to-deal was a legitimate exercise of business judgment. On the contrary, the district court expressly stated that National Screen's explanation that its actions were validly motivated and its evidence in support of that explanation "cannot be heard" (A.16) in view of the fact that it purchased twenty-eight poster renters in 1940. In **Lawlor**, the court found the purchases validly motivated.

c. Plaintiff brands as "remarkable" and then brushes aside as "a wholly gratuitous self-serving declaration" (Brief in Opposition, pp. 29, 30) National Screen's commitment, at the time the 1957 consent judgment was entered, to continue supplying the poster renters for a year. The Antitrust Division obviously exacted this commitment to provide a transition period during which poster renters could seek and obtain from the Producers the standard accessory licenses made available to all applicants on a nondiscriminatory basis under the terms of the judgment. To make certain that the commitment appeared as a part of the overall plan of relief which the Government had fashioned, the Government put National Screen's letter into the record of the hearing on entry of the consent judgment.

Plaintiff's disdainful attitude toward the relief obtained by the Government is eloquently revealing. Plaintiff has attempted to fabricate a case to support a damage claim to line its pockets at the expense of National Screen on a foundation characterized as "Petitioner's Resort to Exclusive License Agreements" (Brief in Opposition, p. 3). Plaintiff would like to ignore the fact that the consent judgment (which was entered just before the beginning of the four-year damage period in this case and was, therefore, in effect throughout that period) assured that all license agreements would be nonexclusive, affording equal opportunities to all. Plaintiff's disdain is a confession that Plaintiff chose not to avail itself of those opportunities because it was unwilling to assume any of the responsibili-

ties to the Producers which the judgment permitted the Producers to require. The judgment permitted the Producers to require assumption of such responsibilities because the Antitrust Division, after a full study of the facts during the five years the Government case was pending, obviously concluded that the Producers have a legitimate need to obtain commitments that will assure adequate distribution of standard accessories advertising their motion pictures.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

Petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari, entered on February 22, 1971, and (2) granting the petition. With full deference and respect, petitioner states the following ground for this motion:

The denial of certiorari in this case must necessarily be interpreted by the bar as meaning that this Court will not review a decision against a defendant in a private action for damages under the antitrust laws no matter how clearly that decision conflicts with another circuit and no matter how wrong the decision may be.

The existence of a belief that defendants in antitrust litigation cannot obtain relief in this Court, even when they fully satisfy the criteria of this Court's Rule 19, has far-reaching implications. It can serve only to encourage more of the kind of thing that has happened in this litigation, which has been going on for over twenty years and has involved 16 separate suits (listed in the Petition for Certiorari at No. 763, Oct. T. 1970, pp. 8-9) in a shameful spectacle of forum shopping in repeated attempts to find some court which might be hospitable to claims which the Court of Appeals for the Third Circuit firmly rejected.

Now that the Court of Appeals for the Fifth Circuit has disagreed with the Third Circuit, there is no likelihood that there will be any further conflicting decision by another circuit since the three other cases now pending (Petition, p. 22) are all in the Fifth Circuit, and respondent's counsel will undoubtedly choose districts in the Fifth Circuit for all of the new cases he has threatened to bring (Brief in Opposition in No. 763, p. 12).

What has happened here surely subverts the high purpose of antitrust enforcement. Only this Court can put a stop to it.

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March 18, 1971

CERTIFICATE OF COUNSEL.

As one of counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

BERNARD G. SEGAL.